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# SUPREME COURT

## OF THE

# UNITED STATES

OCTOBER TERM, 1911.

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CLERK

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,
vs.
UNION PACIFIC RAILROAD COMPANY, ET AL, *Respondents*. } No. 451

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, ET AL, *Respondents*. } No. 452

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,
vs.
GREAT NORTHERN RAILWAY COMPANY, ET AL, *Respondents*. } No. 453

## BRIEF FOR RESPONDENTS.

HALE HOLDEN,
Solicitor for Great Northern Railway Co. and Chicago, Burlington & Quincy Railroad Co.

CHARLES DONNELLY,
Solicitor for Northern Pacific Railway Co.

F. C. DILLARD,
Solicitor for Union Pacific Railroad Co. et al.

THE PIONEER COMPANY, ST. PAUL

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THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, ET AL, *Respondents*.

No. 452

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

GREAT NORTHERN RAILWAY COMPANY, ET AL, *Respondents*.

No. 453

## BRIEF FOR RESPONDENTS.

## *STATEMENT OF THE CASE.*

The Appeals:

The Interstate Commerce Commission has appealed from decrees entered by the Circuit Court of the United States for the District of Minnesota on October 13th, 1910, restraining and enjoining the enforcement, in part, of certain orders of the Commission, made on June 2, 1908.

The orders were made in determining the issues raised by certain complaints before it, against rates upon lumber and forest products from the states of Oregon Washington, Idaho and Montana, filed by carriers, to eastern destinations, and required the reduction of said rates and the establishment of lower rates, prescribed by the Commission in lieu thereof.

As will be later seen, the rates in question, as well as the orders dealing with them, comprehended in a general way all eastern destinations to which lumber and forest products from those states are shipped, including chiefly the states in the Missouri and Mississippi River valleys.

Effective on November 1st, 1907, the carriers participating in this traffic filed, as required by law, tariffs advancing rates previously in effect. Complaints were thereupon lodged with the Commission by the Oregon and Washington Lumber Manufacturer's Association, the Pacific Coast Lumber Manufacturer's Association and others. After answers thereto filed, and hearings before it, the

Commission disposed of the controversy by describing an imaginary line beginning at the intersection of the Red River with the Canadian boundary at the town of Pembina, North Dakota, and running thence southwardly along the western boundary of the states of Minnesota, Iowa and Missouri to Kansas City and thence southwardly along the line of the Kansas City Southern Railway to Port Arthur, Texas, on the Gulf of Mexico. All rates to points on and west of this line that had been in effect prior to the tariffs of November 1st, 1907, were ordered restored. To points east of this line, the tariffs filed by the carriers on November 1st, 1907, had advanced the rates not more than 10 cents per hundred pounds; to certain points, as for instance, St. Louis, the advance was 7½ cents. These advances the Commission condemned, but permitted an advance not to exceed 5 cents per hundred pounds.

The decrees appealed from dealt with the rate basis upon the division of territory thus made by the Commission. Following the recommendation of the Master that as to the rates ordered to points on and west of the Pembina line, no injunction should issue, but that as to the rates east of said line, the orders were beyond the power of the Commission and should be annulled, the Circuit Court issued its injunction against that portion of the orders only and the appeals are taken by the Commission from the decrees thus entered.

The Parties and Complaints before the Commission:

Before the Commission, the Lumber Associations above named, joined by sundry lumber companies and individual manufacturers of lumber, shingles and other forest products and comprising representative producing and shipping interests in the states of Washington and Oregon, were the complainants. The carriers are those originating the traffic, to-wit, the lines comprising the Union Pacific and Southern Pacific systems from Portland, Oregon, and points south thereof, and the Great Northern Railway Company and the Northern Pacific Railway Company, from Portland and all coast and interior points north thereof; these originating lines, with the Chicago, Burlington and Quincy Railroad Company and other connections carry the traffic to Denver, Omaha, St. Paul, Chicago, St. Louis and many other interior and eastern points. Opposite the title page of this brief is a map showing some of these routes, the producing and consuming territories, and the different rate bases, old and new, in issue before the Commission.

Complaint No. 1327 brought by the Oregon and Washington Lumber Manufacturers' Association, et al., involved mainly the interests of Oregon producers and shippers and will be referred to as the Oregon Case.

Complaints 1329 and 1335 brought by the Pacific Coast Lumber Manufacturers' Association, et al., and the Southwest Washington Lumber Manufacturers' Association, et al., related to interests of shippers in the state of Washington and will be referred to as the Washington Case. These two complaints were consolidated and determined in one opinion and order.

Complaint No. 1348 was brought by the Potlatch Lumber Company, et al., representing lumber shipping interests in Eastern Washington and Idaho in the vicinity of Spokane, from which point a differential basis of rates, lower than the Coast basis, is involved. It will be referred to as the Potlatch case, but as the scale of differentials fixed by the Commission is not in litigation and depends upon the Coast basis, little reference will be necessary to that case.

The opinions filed by the Commission in these proceedings are reported in 14 I. C. C. 1, 23: 41, and are printed as exhibits to the answers of the Commission to the several Amended Bills of Complaint.

(No. 451, I. C. C. v. U. P. R. R. Co., et al, Trans. Rec. p. 44,

No. 452, I. C. C. v. N. P. Ry. Co., et al, Trans. Rec. p. 43,

No. 453, I. C. C. v. G. N. Ry. Co., et al, Trans. Rec. p. 45.)

The Bills of Complaint.

Conceiving it to be necessary, the carriers affected by these orders, brought their three separate bills of complaint against the three separate orders. In this court they may be identified as follows:

No. 451, I. C. C. v. U. P. R. R. Co., et al, relates to the order in the Oregon Case,

No. 452, I. C. C. v. N. P. Ry. Co., et al, relates to the order in the Washington Case.

No. 453, I. C. C. v. G. N. Ry. Co., et al, relates to the order in the Potlatch Case.

For all purposes in the court below, the cases were treated as one and they may be so treated upon these appeals. References hereafter will be to the allegations in the Amended Bill of Complaint in Case No. 451, I. C. C. v. U. P. R. R. Co., et al, (Vol. A, page 7.)

Passing the preliminary paragraphs of the bill relating to incorporation, citizenship, location, etc., of the complainants, the facts relating to the venue of the suits, paragraph III of the bill recites by reference, the tariffs covering the eastbound transportation of lumber and forest products that were in effect on and immediately prior to October 31, 1907. These tariffs were filed as exhibits to the bill of complaint in the Court below; there were eight in number.

Paragraph IV of the bill recites the filing of the tariffs of November 1st, 1907, with appropriate

references to titles, numbers and points of origin and destination. These tariffs were also filed as exhibits to the bills in the Court below and all said tariffs being very voluminous, their substance was incorporated in the bills by reference only.

Paragraph IV of the bill also describes the classification in these tariffs, of the different forest products, into groups A, B, C and D, as follows:

> Group A comprises shingles.
>
> Group B comprises lumber, poles, piling and timbers of cedar of single car lengths and certain articles manufactured from cedar.
>
> Group C comprises lumber, poles, piling and timbers of fir, hemlock, larch, pine and spruce of single car lengths and certain articles manufactured therefrom.
>
> Group D comprises long timbers, poles, piling or lumber requiring two or more cars for transportation.
>
> Note—The tariffs show that rates of transportation on these different groups vary somewhat in a fixed relation, according to the character of the articles thus grouped; for instance, the rates on shingles are ordinarily higher, usually by 10 cents, than the rates on fir lumber. It will not be necessary to further pursue these differentials because no question is involved in this litigation thereon. In all further discussion the rates on fir lumber, which comprises the largest item of traffic in these groups, will be used.

Paragraph V of the bill asserts that upon the filing of the tariffs of November 1st, 1907, the rates

therein complained of became the only lawful rates for the transportation of these commodities and that the same then were and at all times since have been, low for the service rendered and in no wise unreasonable or unjust.

Paragraph VI of the bill recites the filing shortly thereafter of the complaints before the Commission, the answers thereto by the carriers, the hearing of evidence, and the submission of the issues to the Commission on March 21, 1908.

Paragraphs VII, VIII, IX, X and XI recite the main order of the Commission upon the particular complaint referred to, together with certain other orders, extending the period of time when the rates prescribed by the Commission were required to be made effective by the carriers to October 15, 1908. In addition to these extension orders, other orders affecting the main order are recited.

As heretofore stated, the issues under the so-called Potlatch case related to differentials in the rates from the Spokane territory in eastern Washington, under Coast rates; for this reason and on account of these differentials, the order in the Potlatch case is related to the orders in the Coast Rate Cases.

In addition thereto, there were pending at the same time, before the Commission, two other proceedings involving lumber rates, one entitled "Pacific Coast Lumber Manufacturer's Association, et al, against the Northern Pacific Railway Company,

et al," No. 1054, involving a demand for the establishment of joint rates and through routes from points on the Northern Pacific and Great Northern lines, north of Portland, through Portland, via the lines of the Oregon Railroad and Navigation Company and other lines, to points in Utah and beyond, which is known as the Portland Gateway case.

The other proceeding was entitled "Western Oregon Lumber Manufacturer's Association, et al vs. Southern Pacific Company, et al." (No. 1331), involving rates on the fir lumber of the Willamette Valley of Oregon, Portland and south, to San Francisco and bay points. This is the proceeding that was the subject of the Opinion of this Court in "The Southern Pacific Company, et al, vs. Interstate Commerce Commission," No. 527, October Term, 1910, decided February 20, 1911, Mr. Chief Justice White delivering the opinion.

There were thus five proceedings pending before the Commission involving rates upon lumber from Oregon, Washington, etc., to substantially all interstate destinations, east and south of the producing territory. As in the Willamette case (so-called), the rates were those under which the traffic was moved south to San Francisco, in these cases, the east-bound rates were the subject of the complaints and orders. It will be seen that the rates here involved covered the territory from the Canadian Boundary, southward as far as Medford,

Oregon, 359 miles south of Portland, including all of the Willamette Valley. (Opinion of Commission, Vol. A, No. 451, p. 61.)

All of these proceedings were under consideration by the Commission at the same time and were decided together. The opinions in the Portland Gateway and the Willamette Valley cases were filed on June 1, 1908, and those in the three cases now under consideration, on June 2, 1908.

These five opinions defined a complete scheme of rates for the movement of all of the lumber and forest products of this territory to substantially all destinations.

The carriers accepted the order in the Portland Gateway case without litigation, but, unable to agree to the justice of the orders in the other cases, brought proceedings to test their validity. The result in the Willamette Valley case appears in the opinion of this Court (supra) and these appeals remain for determination.

Proceeding with the consideration of the bill of complaint:

Paragraph XII of the bill alleges that the effect of the order of the Commission in the Oregon case (the same being true in the Washington case) was to reduce the rates fixed by the tariffs of November 1st, 1907, substantially five cents per hundred pounds and in some instances more.

Paragraphs XIII and XIV of the bill charge that certain provisions of the Amended Act to Regulate

Commerce are in violation of certain provisions of the Constitution of the United States. The issues raised by these allegations in the bill are not before the Court on these appeals and further reference thereto need not be made.

Paragraph XV of the bill alleges that under Section 15 of the Amended Act to Regulate Commerce the only authority vested in the Commission to fix rates is when, after full hearing, it finds that the existing rates are unjust or unreasonable, upon which finding it is then authorized to determine and prescribe just and reasonable rates in lieu thereof. The paragraph charges that the orders in these cases are unauthorized and void, for the reason that the rates contained in the tariffs of November 1st, 1907, were not in excess of just and reasonable charges and for the further reason that upon the hearing before the Commission,

> "no evidence was considered or offered which in any wise showed or tended to show that the rates complained of therein were excessive, unjust or unreasonable, and the defendant Interstate Commerce Commission entered its said orders without any justification therefor, and without any evidence or finding of fact that said rates so fixed by said defendant were excessive, unjust or unreasonable."

Paragraph XVI of the bill alleges that the rates in effect prior to the tariffs of November 1st, 1907, were substantially the same rates that had been fixed by the carriers in the year 1893, and that, sole-

ly by reason of the fact that said rates had been long continued, was the conclusion reached by the Commission, that the rates complained of, in the tariffs of November 1st, 1907, which were higher than the rates theretofore in effect, were unreasonable and unjust, and solely by reason of that fact were the orders so entered by the Commission.

This pharagraph of the bill proceeds to aver that it was established before the Commission by uncontradicted evidence that the circumstances and conditions existing at the time the previous rates were established in 1893, had completely changed and had not existed for some time prior to the advance in rates on November 1st, 1907; that it was further established before the Commission, that in 1893 when the previous rates were fixed, the manufacture and eastward shipment of lumber from the states in question was in its infancy; that at and for some time thereafter, the ample supply of lumber from the states of Michigan, Wisconsin and Minnesota, and from the Yellow Pine districts of the south, completely supplied the demands for lumber in the states of the Missouri and Mississippi valleys, whereby lumber from the states of Oregon and Washington could not be shipped in competition therewith in any considerable amounts, at rates higher than those then established, but that the conditions in this respect had been completely changed.

It is further alleged that all of these conditions and the changes therein were expressly found to be true by the Commission.

It is further alleged that prior to the year 1893, the rates on lumber and forest products to Omaha, St. Paul and other eastern destinations were higher than those established in 1893, and that under said higher rates little, if any, lumber from the Coast states moved eastward; but that following the reduction in rates made in 1893, the lumber interests in Oregon and Washington increased enormously and many mills were built in the interior, so that at and for several years prior to the hearing, eastbound shipments of lumber to the destinations in question, amounting to a large percentage of the output of said states, were being made in increasing volume; that the prices of manufactured lumber since 1893, had greatly increased, resulting in increased profits to the manufacturer, from the markets thus secured to him, through said reduced rates and the general advances in lumber prices in said markets during the years aforesaid.

It is further alleged that the Commission found that each and every one of the conditions surrounding the lumber industry on the Coast had completely changed from the time said rates were established in 1893 and it is alleged that the changes aforesaid and the prosperous condition of the in-

dustry on account thereof, did not require nor justify the further maintenance of rates so low as those established in 1893.

It is further alleged that it was shown by uncontradicted evidence and found as a fact by the Commission, that when the rates were reduced in 1893 and for some years thereafter, the great volume of traffic moving over the lines of railway in question, was westbound, and that the states of Oregon and Washington and the neighboring territory furnished insufficient traffic to load eastbound the cars employed in moving the westbound traffic. It is asserted that the reduced rates on lumber as fixed in 1893, were so fixed at an abnormally low point, not only for the purpose of building up the industry, but also were made possible and justified by the existence of large numbers of cars made empty from westbound shipments to the Coast, and in order to furnish eastbound loads for said cars, which would have otherwise been returned eastward without revenue producing freight, but that for some time prior to November 1st, 1907, this condition had so changed that it had become necessary to haul empty cars in large numbers to these coast states, in order to furnish facilities for the eastbound movement of lumber and forest products shipped therefrom.

It is further alleged that every other important element in the cost of transporting the commodities in question had greatly increased over the cost

of 1893 and subsequent years. All of these changed conditions, it is alleged were found to be true by the Commission; that the Commission found that the direction of the empty car movement in the years intervening since 1893, had been reversed, and that the carriers for some time prior to November 1st, 1907, had been compelled to haul westbound, large numbers of empty cars for the purpose of furnishing equipment in Oregon and Washington for the traffic in question; that the Commission, not only found that the volume of lumber traffic shipped eastbound over these lines, had enormously increased, and that the lumber interests engaged in said traffic, had been extraordinarily prosperous, but also, that the density of traffic on the lines of these carriers had so increased as to be more than could be advantageously handled on single track roads, such as the lines in question substantially are, and that because of this great increase in density, these carriers had been compelled to and were then engaged in constructing double track extensions, in order more advantageously and expeditiously to handle this increased traffic.

It is further alleged that the Commission found that the other expenses of operating these railways had also greatly increased in recent years, especially the cost of labor and material, over and above the expense of operation as it had existed at and for some years after the year 1893, and

further found that the increased traffic had required additional working force and equipment; all such facts so found, supported and confirmed the allegations in the answers of the railroads before the Commission and the evidence offered in their behalf before it, that all of the conditions and circumstances under which the reduction in rates had been made in 1893, had completely changed.

This paragraph in the bill finally alleges that notwithstanding these affirmative findings, and the uncontradicted proof thereof, of the complete change in conditions, the Commission held as a matter of law, that the continuance of said low rates of 1893 raised a presumption that the higher rates of November, 1st, 1907, were unjust and unreasonable, wherein said Commission acted erroneously and through a mistake and under a misapprehension of the law and without authority.

Paragraph XVII of the bill alleges that the rates fixed by the carriers in the tariffs of November 1st, 1907, were lower than the rates charged for any like service by any carriers in the United States and lower than rates theretofore fixed by the Commission for like services; that the rates fixed by the Commission in these cases are unremunerative and confiscatory, and are not and will not be sufficient to pay the cost of conducting the transportation and any just or fair return upon the value of the property used therein; that said rates so fixed bear no fair nor just relation to the rates on other traffic

moving over these lines of railway and that the enforcement of the orders of the Commission will impose an undue and unreasonable burden, not only upon the carriers, but upon the shippers of other commodities and will deprive the carriers of revenue from the transportation of lumber and forest products to which they would be entitled under the rates of November 1st, 1907, in the Oregon case, of more than $600,000 and similarly large sums in Washington and Potlatch cases.

It is further alleged in Paragraph XIV of the bill that the rates established in the tariffs of November 1st, 1907, were low, just and reasonable rates for the services performed, and that the rates prescribed by the Commission in lieu thereof, are and each of them is, unjust and unreasonable and inadequate compensation for the services rendered.

## THE ANSWER OF THE COMMISSION.

(Par. XIV.) Answering the allegations in Paragraph XIV of the bill, in relation to the rates established by the carriers and those fixed by the Commission, the Commission denied that the rates established by it were either unjust or unreasonable within the meaning of the Fifth Amendment to the Constitution, and avers that the Court cannot and will not inquire into the matter as to whether said rates are just and reasonable within any other meaning.

Paragraph XIV of the answer also avers certain special defenses:

> (a) That the complainants should not be heard to maintain this suit for that they have a complete and adequate remedy by proceedings before the defendant (the Commission) upon application for a rehearing whereby, upon a proper showing, the Commission under its power, might suspend, modify or amend the orders complained of; and that in advance of such application the complainants are not entitled to invoke the jurisdiction of this court in equity.
>
> (b) That the court should not hear and determine the rights of the complainants upon any state of facts which were within their knowledge and which they failed and neglected to present before the Commission at the time of the hearing; nor on account of any facts or knowledge which may have arisen since said hearings unless the same be first presented by application for rehearing to the defendant.

The defendant further charges in its answer that it is vested with the exclusive right and power of determining what are just and reasonable maximum rates to be charged on this traffic, and that the reasonableness of such rates is not open to judicial inquiry upon original evidence leading to an independent conclusion. That the determination of what are just and reasonable maximum rates to be charged in the future is a matter of discretion, and that the court ought not to and cannot substitute its judgment and discretion for

that of the defendant, but that the court will only determine whether the rates prescribed by the Commission are just and reasonable within the meaning of the constitutional guaranty above referred to.

Paragraph XV of the answer puts in issue those allegations of the corresponding paragraph of the bill, regarding the reasonableness of the rates of November 1st, 1907, and the unreasonableness of the rates fixed by the Commission. It also denies that the Commission entered its orders without evidence before it or finding that the rates complained of were unreasonable. It alleges, on the contrary, that evidence was offered before it showing and tending to show that the rates complained of and condemned by it were unjust and unreasonable and that such was its opinion; that in accordance therewith it made a report in writing on the subject and stated its conclusions therein, referring thereby to its opinions in each of the cases, and it says:

> "that the facts shown by said investigation, material to be considered by this defendant, are stated fully, fairly and completely in said report."
>
> (Note—From this express averment, that the opinions as rendered by the Commission fully, fairly and completely state the facts which it deemed material to be considered, in the subsequent analysis of the character of the

> power attempted to be exerted by the Commission, it must necessarily follow that the facts as recited in the opinion were all of the facts that did govern and control the Commission in reaching its conclusions. Further light, however, upon the true nature of the power sought to be exercised will be thrown by a consideration of the character and substance of the proof in the record before the Commission.)

Paragraph XV of the answer further expressly avers that while the matters and things embraced in each of the three proceedings now under consideration, were pending before it, there was also pending for determination, similar matters and things in the so-called Portland Gateway Case, above described, involving joint rates and through routes from points north of Portland to Utah common points; and the Willamette Valley case, so-called, involving rates on fir lumber from Portland and points south to San Francisco. It is alleged that by agreement before it, in the three cases under review,

> "any and all matters and things presented to this defendant in the hearing in said other cases might, and should be considered by this defendant with the same force and effect as if the same had been formally presented and made part of the record,"

in the three pending cases.

That is to say, it is averred that by agreement, the Commission was permitted to, and it is to be presumed from its answer that it did, consider all the evidence in all of the cases then before it, in reaching its conclusions as to lumber rates, in its opinion just and reasonable, to all destinations, eastbound and southbound, from this general producing territory. It follows from this allegation in the answer, that all of these five proceedings were weighed, considered and determined as one general subject.

Paragraph XVI of the answer alleges that there was some conflict in the testimony and evidence before the defendant; that each and every member thereof gave personal attention to the testimony and heard the parties in oral argument, examined and considered the various matters of fact and arguments contained in the briefs, and that the opinions and orders are the result of painstaking consideration and care on the part of each member.

It is again averred that the Commission is vested with exclusive power of determining reasonable rates, subject to review by the courts, only in the event that,

> "it be made clearly to appear that the orders complained of transcend the pale of legitimate regulation and constitute such a violation of the constitutional rights of the carriers as to shock the conscience of a chancellor."

Paragraph XVII of the answer denies that the rates fixed by the orders are unremunerative and

confiscatory in any sense; it avers that the rates so established are higher than the rates voluntarily established by the carriers for the same transportation, covering a long period of years. It avers that the complainants for the last ten years have received from their operations, as common carriers, munificent returns upon the property invested and that such returns are far above the average received by carriers in other parts of the United States.

Laying aside the special defenses pleaded, the substance of the answer may fairly be stated to be as follows:

(a) that the power of the Commission in determining rates is a wide discretion limited only by the provisions of the Fifth Amendment to the Constitution, and, indeed, only then limited by "such a violation of the Constitutional rights of the carrier as to shock the conscience of a chancellor." Its determinations are beyond review of the courts except upon that ground.

(b) the rates prescribed by the Commission are neither unremunerative nor confiscatory because they are higher than the rates voluntarily established by the carriers for the same transportation covering a long period of years.

(c) the carriers affected by the orders during the last ten years have received from their operations as common carriers, munificent returns far above the average received by carriers in other parts of the United States.

(d) there was evidence before it tending to show that the rates of November 1st 1907, were unreasonable.

Other than the foregoing, the answer is a denial of the allegations of fact contained in the bill. Replication was duly filed.

*ISSUES BEFORE COMMISSION.*

It has been seen that one of the charges in the bill of complaint (Par. XV) is that,

> "no evidence was considered or offered which in any wise showed or tended to show that the rates complained of therein were excessive, unjust or unreasonable, etc."

It will be seen that the Master found that there was no substantial evidence before the Commission, or before him, tending to prove that the advanced rates of November 1, 1907, were unreasonable. (Vol. A, No. 451, p. 111).

From the inception of this litigation, the complainants have insisted that the Commission acted beyond its power, arbitrarily or under a misconception of its power, in ordering these rates reduced and that instead of determining the question within its power whether for the service rendered, the rates of November 1, 1907, were reasonable, in fact, it condemned those rates and required lower rates to be published (1) because the lumber industry had enjoyed the lower rates for many years and investments had been made upon the faith thereof and loss of business, investments, profits and markets would result from the advance, (2) because the long continuance of

the old rates created a presumption that they were reasonable and adequate. Notwithstanding the uncontradicted and overwhelming proof of marked change in conditions, making for tremendous increases in transportation cost, of which the reversal in the empty car haul was the most significant item, the Commission rested its decision in great degree, upon an erroneous view of the permanence of this presumption, and allowed it to persist and overturn ample and convincing proof that completely rebutted it. Finally, (3) because they believed that the carriers on their whole business were receiving sufficient revenue.

> NOTE—The dissenting opinion of Chairman Knapp and Commissioner Harlan, Vol. A, No. 451, p. 62, lends strong support to these conclusions, especially when read in connection with the majority opinions. These will be later considered in connection with an analysis of the character of proof in the record.

## *COMPLAINTS BEFORE COMMISSION.*

In order to obtain a correct view of the position taken by the Commission in deciding these issues, it will be important to examine the complaints filed before it.

By stipulations entered into in the court below, the entire record before the Commission was offered and considered in evidence. (Vol. 2, p.

778; Vol. 3, p. 911.) In addition to the abstract of oral testimony and exhibits agreed upon and offered before the Master, it was stipulated that any reports and documents on file with the Commission or referred to on the hearing before it, might be referred to and printed for use of the Master or Court.

Under the terms of these stipulations we print below certain paragraphs from these complaints which will indicate in part, at least, the character of the issues brought by the complaining shippers before the Commission.

It is not denied but that each of the complaints charged in definite language, that the advanced rates were unreasonable and excessive; neither is it denied that there is language in the opinions of the Commission which, if segregated from the whole and read without reference to the substance of the complaints, and the character of the proof that was offered in support thereof, would indicate that in deciding the cases, the Commission concerned itself only with the reasonableness of the rates in and of themselves with regard to the service rendered. When the entire proceedings are analyzed, however, the ultimate question on these appeals of the real character of the power exercised will arise and it will be seen that the Circuit Judges in the Court below were correct in holding that the Commission acted beyond its power.

Paragraph XII of the Oregon complaint charges that the advanced rates were established by unlawful concert of action and were unjust and unreasonable and not made necessary by reason of any conditions affecting the business of the carriers or the transportation of forest products, and proceeds:

> "that the imposition and collection of said rates will render the business and plants of complainants and those similarly situated in the State of Oregon and other points and places in the Pacific Northwest of but little value and subject complainants to great and irreparable loss."

It also says:

"XIV.

"That the manufacture of lumber and other forest products constitutes one of the largest and most important industries in the State of Oregon and in the other Pacific Northwest States. Complainants and others engaged in the lumber business in the State of Oregon, have invested in plants, machinery, equipment and appurtenances a large sum, to-wit: the sum of sixty million dollars ($60,000,000) or thereabouts, not including the value of material on hand, logs, standing timber or timber lands; than more than forty thousand (40,000) persons in the State of Oregon are directly engaged in said industry; that the annual pay roll exceeds twenty million dollars ($20,000,000), and approximately about one-fourth of the total number of wage earners in the State of Oregon are directly connected with

the lumber and timber industries in said State and that the entire population of said State is affected vitally and almost directly by the continuance and prosperity of said industries; that the annual output of lumber of the State of Oregon exceeds two billion (2,000,000,000) feet, of the value at the mill of thirty million dollars ($30,000,000), or thereabouts; that the amount of freight paid annually on rail shipments from points in the State of Oregon to points in other States approximates twelve million dollars ($12,000,000). Said estimates being based on the movement by rail of six hundred million (600,000,000) feet of lumber representing about thirty thousand (30,000) carloads."

"XV.

"Complainants show that a large part of the investment in the lumber industry in the State of Oregon was made upon the faith that the rates of freight heretofore in effect to the consuming markets and which were voluntarily placed in effect many years ago by all said defendants, would not be increased, but rather, in view of the fact that the general trend of rates has been downward for a number of years, and of the marked increase in the tonnage of lumber, said rates would be decreased."

"XVI.

"That the rates on lumber heretofore in effect were voluntarily established by the defendants and other connecting railroads in about the year 1893 and have since been continuously in effect with substantially no changes, and complainants relied upon the presumption that the rates were reasonably high and com-

pensatory, and that the same would not be advanced to the detriment of the shippers and the public in the absence of some urgent and impelling cause such as would justify the advance.

That the complainants and other lumber manufacturers in the State of Oregon and the Pacific Northwest have, at great expense, and in many cases at the instance and on the solicitation of the representatives of the defendant railway companies, spent large sums of money in introducing the lumber products of the northwest into the markets of the States and Territories hereinbefore mentioned, and under the advanced rates imposed by said tariffs will be able to sell but little if any of their said products in said States and territories, not only to their great loss and damage, but to the loss and damage of all the consumers of lumber in said States and Territories."

"XVII.

"That encouraged and induced by said action and conduct of the defendants and relying upon the good faith of the same and that the rates then in force and voluntarily placed in effect by all of said defendants would be continued, many of complainants and other persons, firms and corporations engaged in the business of manufacturing lumber and forest products, constructed and equipped their mills, as said defendants have all along well known, and many of complainants and others similarly situated would not have made such investments had it not been for said encouragement given them by the defendants and had it not been for the tariff rate thus voluntarily established and put into effect by them and had it not been that complainants fully relied upon

the good faith of said defendants and believed that said tariff rates would be continued.

That said increase shown by said tariffs of said defendant companies, and other conecting carriers, is destructive of, and highly injurious to, the business of the complainants and others similarly situated and largely impairs the value of their property by the placing of unnecessary and grievous burden and tax upon the transportation of their products by rendering practically inaccessible their available markets and defeating equal competition in said large territory without any cause.

That said unjust and unlawful increase imposes upon the forest products shipped by complainants and others similarly situated, so carried as interstate commerce under like circumstances and conditions, an excessive burden out of line with and far more grievous than is charged for the same products from other points as aforesaid or for other products and commodities of like weight, cost of carriage, value of product, service and all other conditions considered."

"XXI.

"That the lumber manufacturers of the State of Oregon, and of other North Pacific States come in competition with the lumber manufacturers of the yellow pine district in the Southern States, in all of the territory west of Chicago and with the lumber products of the States of Wisconsin and Minnesota and adjacent States in the Chicago territory and territory north and west of said point as far as St. Paul.

That under the tariffs heretofore in effect from what is known as the yellow pine district and the white pine district to said territories

said lumber manufacturers of the State of Oregon and the Pacific Northwest, and under said new tariff competition will be practically eliminated on the greater portion of the lumber products in said territory to the great loss and disadvantage, not only of the lumber manufacturers and producers of the Northwest, but to consumers of lumber and forest products in all of said territories."

The Washington complaint proceeds as follows, after allegations that the advanced rates are unjust and unreasonable:

"V.

"The manufacture of lumber, and other forest products, constitutes one of the largest and most important industries in the State of Washington and the Pacific Northwest. Petitioners, and others engaged in the lumber business in the State of Washington, have invested in plants, machinery, equipment and appurtenances a large sum, to-wit, the sum of one hundred million dollars ($100,000,000), not including the value of material on hand, logs, standing timber, or timber lands; that more than ninety thousand (90,000) persons are directly engaged in said industry; the annual pay-roll exceeds sixty million dollars ($60,000,000); that approximately two hundred thousand (200,000) people are directly dependent for their livelihood upon said industry; the annual output of lumber exceeds four billions (4,000,000,000) feet of the value at the mill of sixty-five million dollars ($65,000,000), while the annual output of shingles exceeds in value at the mill seventeen million dollars ($17,000,000); that the amount of freight paid annually on shipments from points in the State

of Washington to points in other states approximates twenty-five million dollars ($25,000,000), said estimate being based on the movement of one billion, one hundred million (1,100,000,000) feet of lumber, representing about seventy-six thousand five hundred (76,500) carloads, and thirty-four thousand one hundred and twenty (34,120) carloads of shingles.

That the annual output of lumber, including shingles, exceeds in value and importance that of any other industry in the State of Washington; the annual output of lumber being of the value of eighty-two million dollars ($82,000,000); while the next highest industry, grain, is valued at forty million dollars ($40,000,000); fish at fifteen million dollars ($15,000,000); and coal at ten million dollars ($10,000,000)."

"VI.

"Petitioners show that a large part of the investment in the lumber industry was made upon faith that the existing rates of freight to the consuming markets would not be increased, but rather decreased, in view of the fact that the general trend of rates has been downward for a number of years; and in view of the further fact that the marked increase in the tonnage of lumber should result in lower rates. Petitioners allege, upon information and belief, that rates generally in the United States on the average of all traffic have been reduced not less than twenty per cent within the past twenty years, and they charge that the transcontinental rates have declined in even a greater proportion; and in support of this allegation it is shown that the rate per ton mile on all traffic of the defendant Northern Pacific

Railway Company decreased from .099 in 1900 to .083 in 1906, a decrease of 16.1 per cent in six years; and the rate on lumber not having been reduced, the decrease relative to all other traffic is materially greater than the figures indicate. Petitioners show that the last existing rates on lumber were voluntarily established by the carriers in the year 1893, and have since been continuously in effect; and they submit that they had a right to rely upon the presumption that the rates were reasonably high and compensatory, and that they would not be advanced to the detriment of the shippers and the public, in the absence of some urgent and impelling cause such as would justify the advance. Under the previous tariffs, as they existed for fourteen years, the rates were: On fir, spruce, and hemlock, to St. Paul, 40c a hundred pounds; to Omaha, 50c; and to Denver 40c; on cedar and cedar shingles, to St. Paul 50c; to Omaha 60c; and to Denver, 60c on shingles and 50c on lumber. Under these rates it was difficult for the lumber manufacturers of Washington to compete in the markets named with other woods which were and are accorded a more favorable rate of freight; and they could only compete in such other woods in Chicago, Detroit, and other consuming markets in the north-central and other states, by shrinking the value of their product to a point where there was little or no margin of profit. Only the higher grades of lumber could move under then prevailing rates to consuming territories in other states, so that in order to obtain these marketable grades something like twenty millions of dollars ($20,000,000) in value representing approximately 53,000 carloads, were being annually wasted in the destruction of smaller timber and of

the lower grades of lumber that could be serviceably used in the consuming markets, if the rates of freight then or now permitted the movement. Petitioners submit that this great waste affects not only the interests of those engaged in the lumber industry, but is a matter of national public concern."

"IX.

"The said advance in part in the rates on lumber and shingles amounts to ten cents a hundred pounds to St. Paul, Denver and Chicago; seven and one-half cents a hundred pounds to St. Louis; and five cents a hundred pounds to Omaha and Kansas City, and to a lesser sum to intermediate territory and other points and places; as shown by statements hereto attached, marked exhibits "A," "B" and "C," which statements show the prior rates and the advanced rates to certain of the markets above named, based upon the published tariffs of the defendants.

Petitioners further show that the said advance in rates does and will greatly injure and to a large extent destroy the lumber industry in the State of Washington, and will result in irreparable injury to your petitioners and others engaged in this business within this State and the Northwest Pacific Coast, as well as work a serious detriment to the public interests. The advance amounts to Forty-eight ($48.00) Dollars a car on lumber, and Thirty-six ($36.00) Dollars a car on shingles to St. Paul and Denver, Chicago and other Eastern markets, and to a smaller sum to intermediate points and places, which is excessive, unreasonable and unjust and more than the traffic can bear. Petitioners and other manufacturers of lumber on the North Pacific Coast will

be and are utterly unable to compete with other and more favored woods in the markets of the middle and north central states, which markets now take and consume a large amount of the Pacific Coast product. The said advance in rates does and will continue to drive the Pacific Coast lumber from these markets and will and does greatly restrict the territory within which it can find a market. From information derived by petitioners from dealers in fourteen states to which petitioners have heretofore shipped large quantities of lumber; it is shown that the markets in those states will be and are practically destroyed. The mills in this state and territory will be and many are already forced to shut down, or to dispose of their product at ruinous prices. Coastwise and foreign markets are now very unsatisfactory, and should the normal product of existing mills be forced upon the local and nearby markets, or offered for local or foreign trade, the result will be a complete demoralization in prices which will be disastrous in its effect upon the lumber industry and result not only in great and irreparable loss to the manufacturers, but also in great depreciation in the value of timber lands. Interstate shipments will be confined to the very highest grades of lumber, and in consequence the waste necessary to secure these grades will be very great. The advance will deprive the public in the great consuming territories of the benefit of obtaining Pacific Coast lumber, for that in view of the competitive conditions neither the dealer nor the consumer in such territory will or can be required to absorb the advance; and as herein shown, the Pacific Coast manufacturer cannot deduct the advance in rates from the selling prices of his product."

The Southwestern Washington complaint (consolidated in the opinions of the Commission with the main Washington case) likewise alleges:

"XI.

"That the manufacture of lumber and other forest products constitutes one of the largest and most important industries in Southwest Washington. Complainant and others engaged in the lumber business in said territory have invested in plants, machinery, equipment and appurtenances more than $10,000,000.00, not including the value of material on hand, logs, standing timber or timber lands. That more than Ten thousand (10,000) persons in said territory are directly engaged in said industry and approximately one-half of the wage earners in said territory are directly connected with the lumber and timber industries and that the entire population of Southwest Washington is, to a great extent, dependent upon the lumber and timber industries."

"XII.

"Complainant shows that a large part of the investments in the lumber industry in Southwest Washington was made upon the faith that the rates of freight heretofore in effect to the consuming markets and which were voluntarily placed in effect many years ago by all said Defendants would not be increased, but rather, in view of the fact that general trend of rates has been downward for a number of years and of the marked increase in the tonnage of lumber, said rates would be decreased.

Complainant alleges that substantial reductions in freight rates generally in the United States, on the average of all traffic, have been

made in the past twenty years, and that the rate per ton per mile, on all traffic of the Defendants has decreased during the last ten years. That as illustrative of said decrease the rate per ton per mile on all traffic of certain of the Defendants for the years 1900 and 1906 was as follows:

| | 1900 | 1906 |
|---|---|---|
| Northern Pacific Railway Company ..... | .1047 | .0828 |
| Chicago, Burlington & Quincy Railroad Company ..... | .085 | .081 |

That a substantially like decrease has been made on all traffic of the other Defendants during said period.

That the rate of freight charged for the transportation of lumber during said period has not been reduced, and because lumber constitutes a large proportion of the traffic of said Defendant Companies, the general decrease above set out is relatively materially greater on all other traffic than the above table would indicate."

"XIII.

"That the Complainant and other lumber manufacturers in the State of Washington and the Pacific Northwest have, at great expense, and in many cases, at the instance and on the solicitation of the representatives of the Defendant Railway Companies spent large sums of money in introducing the lumber products of the Northwest into the markets of the States and Territories before mentioned, and under the advance rate imposed by said tariffs, will be liable to sell little if any, of their said pro-

ducts in said States and Territories, not only to their great loss and damage, but to the loss and damage of all the consumers of lumber in said States and Territories."

"XIV.

"That encouraged and induced by said action and conduct of the defendants, and relying upon the good faith of the same, and that the rates then in force and voluntarily placed in effect by all of said defendants would be continued many of complainants and other persons, firms and corporations engaged in the business of manufacturing lumber and forest products, constructed and equipped their mills as said defendants have all along well known and many of complainants and others similarly situated, would not have made such investments had it not been for said encouragement given them by the defendants, and had it not been for the tariff rates thus voluntarily established and put into effect by them and had it not been that complainants fully relied upon the good faith of said defendants and believed that said tariff rates would be continued. That said increase shown by said tariffs of said defendant companies, and other connecting carriers is destructive of, and highly injurious to the business of the complainant and others similarily situated and largely impairs the value of their property by the placing of unnecessary and grievous burden and tax upon the transportation of their products by rendering practically inaccessible their available markets and defeating equal competition in said large territory without any cause.

That said unjust and unlawful increase imposes upon the forest products shipped by complainants and others similarly situated so car-

ried as interstate commerce under like circumstances and conditions an excessive burden out of line with, and far more grievous than is charged for the same products from other points as aforesaid or for other products and commodities of like weight, cost of carriage, value of product, service and all other conditions considered."

"XVIII.

"That said tariffs herein specified and in effect just prior to the 1st day of November, 1907, always have been, and still are more than fair, just, reasonable and remunerative for the defendants, and each of them, and that the tariff earnings of each and all of said roads are and have been for many years past, constantly increasing; that the defendants and each of them have from time to time materially and substantially increased their net revenue and profits and their net surplus under their tariffs formerly in effect, and at all times have been and still are earning large profits by means of said tariffs, so that no increase over the rates on lumber and forest products heretofore in effect is reasonable or should be permitted.

That said proposed advance in rates herein specified and complained of is not made necessary by reason of any changed conditions affecting the transportation of forest products, or the service required in connection therewith or the financial condition of the defendants.

That said proposed new rates discriminate against complainant and subject complainant and the various localities in which they conduct their business to undue and unreasonable prejudices and disadvantages and give un-

due and unreasonable preference and advantages to persons other than complainant and those similarly situated and to localities other than those wherein complainants transact their business, all in violation of the provisions of the act entitled "An Act to Regulate Commerce," approved February 4, 1887, and the Acts amendatory thereof and supplemental thereto."

"XXI.

"Complainants further show that the proposed advance in rates will greatly injure, and to a large extent destroy, the lumber industry in the State of Washington and will result in irreparable injury to complainants and to others engaged in business within the State of Washington, and the Pacific Northwest Coast States, as well as be a serious detriment to the public interest. The advance in rates which is about to be put into effect by the defendants will amount to about Fifty Dollars ($50.-00) on each carload of lumber, and about Thirty-six Dollars ($36.00) on each carload of shingles to St. Paul, Denver, Chicago and other eastern markets which said advance is excessive, unreasonable and unjust, and more than the traffic can bear.

That said advance would deprive the public in the great consuming territories in the United States to which said product is now shipped of the benefit of obtaining Pacific Coast lumber for that in view of the competitive conditions now existing, neither the dealers nor the consumers in such territory will or can be required to absorb the advance, and the Pacific Coast manufacturer would be unable to advance the prices of said lumber sufficiently to cover the said advance in rates or any part thereof."

The carriers answered these complaints with averments substantially denying the allegations therein, asserting the changes in conditions and the reasonableness of the advanced rates.

The evidence offered by the complainants consisted:

(1) of witnesses engaged in the lumber industry, who testified to cost and selling prices, conditions of manufacture, competitive conditions and markets reached, condition of the industry and causes thereof, their reliance on a continuance of the previous rates, belief in their right to them and need of the industry for a continuance of them;

(2) one witness, having some experience in rate matters, who produced numerous exhibits containing statistical rate comparisons, etc.;

(3) statistical evidence, from railroad reports to Commission and stockholders relating to revenues and expenses, interest and dividends, character and tonnage of traffic and generally speaking, a large amount of such data relating to the entire operations of these carriers.

Before proceeding further, it will be of assistance to briefly recite from the record the essential facts relating to the history of the rates and the growth of the traffic thereunder.

## *FACTS RELATING TO THE RATES AND TRAFFIC.*

**Prior to November 1st, 1907 the following were the rates in effect from coast points to the larger destinations in the middle west:**

| | Cents per 100 pounds. |
|---|---|
| Coast to St. Paul, | .40 |
| Coast to Omaha, | .50 |
| Coast to Chicago, | .50 |
| Coast to Denver, | .40 |
| Coast to St. Louis, | 52½ |

**By the tariff of November 1st, 1907, these rates were advanced as follows:**

| | |
|---|---|
| Coast to St. Paul, | .50 |
| Coast to Omaha, | .55 |
| Coast to Chicago, | .60 |
| Coast to Denver, | .50 |
| Coast to St. Louis, | .60 |

**Prior to November 1st, 1907, rates from the Spokane district were as follows:**

| | |
|---|---|
| Spokane to St. Paul, | .40 |
| Spokane to Omaha, | .45 |
| Spokane to Chicago, | .50 |
| Spokane to Denver, | .40 |
| Spokane to St. Louis, | .52½ |

On November 1st, 1907, the rates from Spokane were published to be effective as follows:

| | |
|---|---|
| Spokane to St. Paul, | .45 |
| Spokane to Omaha, | .50 |
| Spokane to Chicago, | .55 |
| Spokane to Denver, | .45 |
| Spokane to St. Louis, | .55 |

East of the Spokane territory is a third district known in the tariffs as the Montana-Oregon territory, including as typical points Kalispell on the Great Northern, Hamilton on the Northern Pacific and Boise on the Oregon Shore Line. From this district the rates prior to November 1st, 1907, were as follows:

| | |
|---|---|
| Montana-Oregon points to St. Paul, | .40 |
| Montana-Oregon points to Omaha, | .40 |
| Montana-Oregon points to Chicago, | .50 |
| Montana-Oregon points to Denver, | .35 |
| Montana-Oregon points to St. Louis, | .49½ |

By the tariffs of November 1st, 1907, the following rates were proposed:

| | |
|---|---|
| Montana-Oregon rate points to St. Paul, | .43 |
| Montana-Oregon rate points to Omaha, | .43 |
| Montana-Oregon rate points to Chicago, | .53 |
| Montana-Oregon rate points to Denver, | .40 |
| Montana-Oregon rate points to St. Louis, | .52½ |

In connection with these rates it is important to note that the Cascade Mountains running north

and south through the States of Oregon and Washington form a natural division of the states into two main parts. West of the summit of the Cascade Mountains down to the shore of the ocean there is a large district which is heavily timbered, covered with trees of large and magnificent proporions. This district extends from the International boundary, so far as the United States is concerned, southward; and constitutes what in the tariffs is known as the Coast Rate Territory. As will appear later, the carriers have applied to eastern destinations the same rates from all points west of the summit of the Cascade Mountains, and from the International Boundary on the north to Medford, 359 miles south of Portland, on the Southern Pacific Lines. Prior to November 1st, 1907, the rates from this entire territory, Portland and north, on fir lumber was 40 cents to St. Paul and 50 cents to Omaha and Chicago.

The eastern slope of the Cascade Mountains is also timbered but the trees are not of the same magnificent character as are found on the western slope. This eastern slope, at times, carried a slightly lower basis of rates to eastern destinations but for the purposes of this brief, it will not be necessary to further refer to it.

East of the base of the Cascade Mountains is an open farming country three or four hundred miles in extent. Approaching Spokane, the west slope of the Rocky Mountains is encountered and

timber again appears. There has always been a rate basis from Spokane to eastern destinations, and rates from Spokane have to some destinations been less than those from the coast. East of Spokane, using the Great Northern Line as an illustration, Kalispell, White Fish, Columbia Falls, etc., are lumber producing points, but are in the Montana-Oregon rate territory and carry slightly lower rates than those obtaining from Spokane.

In 1893 and prior thereto the rate on fir lumber to Omaha was 55 cents; to St. Paul it was 55 cents; to St. Louis it was 57½ cents; to Chicago it was 60 cents. There were at different times variations in the way of reductions or advances in these rates prior to 1893 but as noted by the Commission in its opinion in the Washington case (No. 452):

> "These fluctuations do not appear to have been coincident with nor dependent upon any fluctuation in the volume of the traffic, but would seem to be due to the exigencies of the carriers in competing for and making rates to secure the business."
>
> See Tables of Rates at different times, in decision of Commission in Washington case, pp. 48-52, Vol. A, No. 452, I. C. C. v. Northern Pacific Ry. Co., et al.

The only important point to be noticed here is that *prior to 1893 the rates to St. Paul and the Missouri River were the same and were uniformly upon a higher basis than those established in 1893.*

In that year the Great Northern Road was completed to the coast. That fact led to a reduction in rates.

At that time the production of lumber in Minnesota, Wisconsin and Michigan was at a high tide, the testimony in the case showing that the output of white pine lumber was fully sufficient to supply all of the middle western country. It was testified by one witness that the City of St. Louis, which today, is almost at the gateway of the southern yellow pine district, was built of white pine from the north. Other witnesses testified that the movement of white pine logs and lumber by the lakes and the Mississippi River built up large sawmilling industries as far south as Hannibal and St. Louis, Missouri. There was such an abundance of the white pine output that it supplied the requirements of the States of Iowa, Missouri, Kansas, Nebraska and Illinois and certain of the eastern states. It was the chief and almost the only lumber at and prior to that time that was used in the building up of this middle western country.

In order to understand the conditions bearing upon the rates from the coast in 1893, *it is necessary to understand the character of the rates applying then on white pine and also, as time went on, upon yellow pine from the south.*

Rates on white pine in Minnesota, Wisconsin and Michigan had always been affected by and been made to meet the competition of vessels upon the

Great Lakes and the Mississippi and other inland rivers. The vessels had always brought white pine either in the rough or in the finished state from Duluth and oher lake ports down to Chicago. Rates upon vessels of this kind had always been low because the cost of this kind of transportation is always relatively low, and these rates added to the rail rates into Illinois, Iowa, Missouri and surrounding states brought about a very low basis of rates upon this product. White pine logs had for years been floated down the Mississippi River and its tributaries in large volume for manufacture at cities on the river. This form of transportation of the log is the least expensive of all, and as a result the transportation cost upon the finished lumber into the interior of the adjoining states had always been upon a very low basis. (Testimony of C. I. Millard, Vol. 4 Transcript p. 1333.) All-rail carriers leading from the white pine forests or the lumber mills north of the Twin Cities have had to meet rates thus constructed; and as a result the testimony fairly shows that all of the rates, all-rail from northern manufacturing points to these central states, which are the chief concern in this litigation, were directly affected by water competition

At or about the same time the yellow pine industry began to creep north. The development of the movement of grain to the gulf ports over roads like the Illinois Central produced a growing southbound tonnage and it became important to the man-

agers of those roads to find north-bound tonnage to fill empty cars on their return trip.

It is significant to note in the case of *Texas & Pacific Railway* v. *The Interstate Commerce Commission*, known as the Import case, 162 U. S., 197, that even prior to 1893 the need for north-bound tonnage was felt by the lines leading to the gulf. This case arose out of an order of the Interstate Commerce Commission relating to import rates through the port of New Orleans and the subsequent proceedings in court relating to the effort of the Interstate Commerce Commission to enforce that order. The merits of that case are of no importance here, but it is important in this connection to note that this Court commented upon the answer of the Texas & Pacific Railroad Company, justifying the maintenance of import rates at a lower scale than those fixed for domestic business. The Court said page 206:

> "These allegations of the answer were not traversed or denied by the Commission, but are confirmed by the findings of the Commission attached as an exhibit to the petition in the case; and by said findings it further appears that the proportion the Texas & Pacific Railway receives of the through rate is remunerative—that the preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative than can be obtained to put in its cars to pay mileage," etc.

This case was decided by the Supreme Court in 1896 and the order of the Interstate Commerce Commission upon which it was based was made in January, 1891.

From this it appears that at that time the lines from the gulf ports were seeking to build up northbound traffic to balance their empty car movement, and that case had to do with their efforts to encourage and create as large an import business through the gulf ports as possible.

The building up of the yellow pine industry was another effort on the part of these same lines to find loads for cars made empty at the gulf ports. Southern yellow pine offered business in enormous quantities in the south and having empty cars moving north, the carriers in that part of the country were able to make very low rates in order to develop this movement. Many of those lines have low grades and their operating cost is correspondingly less than that of lines leading from the Pacific Northwest.

In Burgess v. Transcontinental Freight Bureau et al., 13 I. C. C. p. 678, the Commission said: "The line of the Illinois Central between Memphis and New Orleans is practically a water grade, and freight can be moved at an extremely low cost. The general level of rates upon the line of that railroad is far below that upon the transcontinental lines involved in this proceeding."

But in order to bring the yellow pine north, it not only required a low rate to meet the water competitive rate already in effect on white pine from the north, but there was a prejudice against yellow pine from the long-continued use of white pine; and therefore, in order to establish the yellow pine industry in the markets already occupied by white pine, there was a further reason for low rates so that the product could be introduced and sold. Thus under these conditions in 1893, the middle western country on both sides of the Mississippi River was the scene of sharp competition, in growing amount as the yellow pine came north in large volume.

Testimony of C. I. Millard, Vol. 4 Transcript pp. 1331-1341.

J. A. Munroe, Vol. 1 Transcript pp. 303-310.

J. G. Woodworth, Vol. 1 Transcript pp. 376-380.

A third condition also is to be borne in mind and that was that in 1893 the country was in the throes of a financial panic and prices were at a very low ebb. It was several years after 1893, as is well known, before the country began to recover from the effect of this panic; and there was a period of several years during which prices of lumber as well as other kinds of material, and also prices of labor, were, compared to what they have since been, upon a very low scale.

At this time, as above stated, the prevailing rate on western lumber to Omaha and to St. Paul was 55 cents. It is doubtful whether there was much if any lumber moved at that rate, largely because of the abundance of the supply in the north and the south, and also because of the low prices then obtaining. Furthermore, fir lumber was an unknown quantity in the eastern market and there was a prejudice against it.

*Upon the completion of the Great Northern road to the coast the obvious need was eastbound tonnage.* At that time the preponderance of the traffic was westbound; the manufacturers in the east were shipping their products to the west for the building up of the country, and the people in the west had little if anything to ship east. The testimony shows that after the Great Northern reached the coast for some years the great majority of the cars returned east empty. While there was and had been for many years lumber manufactured on the coast, it was used or disposed of locally or shipped by water to California and other points accessible from coast ports, or else to foreign ports. There was apparently no eastern shipment of importance. Canned salmon was about the only product which offered loads for eastern shipment and, as testified to, there was very little of that. The abundance of timber and the opportunity thus afforded for the manufacture and eastern shipment of lumber offered the only prospect of eastbound load-

ing *and in order to encourage this movement the Great Northern road reduced the rate then in force to St. Paul to 40 cents; the rate to Chicago was made 50 cents;* the addition of ten cents thus made to the St. Paul rate being all that the roads between St. Paul and Chicago could obtain on account of the proximity of Lake Michigan and the influence of the lumber industry in white pine on the Mississippi River.

The Union Pacific interests refused to meet the reduction thus made at St. Paul, although the distance to Omaha is, ordinarily speaking, less from coast points of origin than to St. Paul. The Union Pacific interests always felt that the 40 cent rate to St. Paul was unreasonably low and they declined to make the corresponding reduction to Omaha, but fixed the Omaha rate at 50 cents. The Northern Pacific was compelled to meet the 40 cent rate at St. Paul. As the Chicago rate was made 50 cents via St. Paul, it was obvious that the Union Pacific lines could haul no lumber to Chicago unless they made the 50 cent rate there, *so the Omaha rate was forced by competition through to Chicago and thereby the 50 cent rate was established at all of the intermediate territory as a maximum.* This was a reduction also of ten cents, to Chicago, caused by the reduction in the St. Paul rate.

Under the conditions then existing, with empty cars moving eastward in considerable volume, the lumber business thus opened up, constituted what

has been recognized as and has been frequently called "surplus business." The decisions of the courts and the Commission have justified the making of very low rates on business of this character in order to obtain loads for empty cars. As has been held in different cases, anything which added to the income of the road and provided some revenue to pay the difference between the hauling of an empty and a loaded car was that much of an advantage; but it is important to remember that this was not the sole condition governing the making of this rate. All costs of operation of the railroad at that time were much lower than in later years, and as above stated, the abundance of lumber from the northern and southern districts, and the low scale of prices then being obtained, created a condition whereby it was necessary for a very low rate to be applied to this new and untried product which was being introduced in competition with the better known white pine, and the growing consumption of yellow pine.

It was some years after 1893 before there was any notable advance in the movement of lumber from the coast. The proof shows that it was not until 1900 and thereafter that the business grew to any marked extent; but at or about that time conditions began to change, prices began to advance and the country began to rapidly grow. There was a period following 1900 when there appeared to be hope of a large increase in the export trade through the Pa-

cific ports with the Orient, and the hope was felt by the railroad authorities that tonnage would be supplied in this way to make westbound loads. Every effort possible was put forth to develop the export trade, but for reasons not now necessary to mention, those efforts largely failed and that source of tonnage has materially fallen off.

With the coming of 1905 and 1906 a marked and tremendous change in conditions appeared. The railroad cost had enormously advanced; wages had increased from 20 to 40 per cent., embracing every class of railroad labor; taxes increased nearly 50 per cent., and lumber of all kinds for railroad work advanced approximately 120 per cent. The shipment eastward of Pacific Coast lumber grew to tremendous proportions and the immediate consequence was that the empty car haul, particularly of the northern lines, was completely reversed.

The shipment eastward of other forms of traffic has had little to do with the change in the empty car movement; and it may be stated here that the remarks of the Commission in its opinions in the coast cases on that subject, are not borne out by the exhibits in evidence and the testimony of the witnesses who are familiar with the facts. It is sufficient here to note that the great, and in fact the only noticeable form of eastbound traffic that moves in considerable volume on the northern lines is, and for several years has been lumber and forest products of different kinds. *The westbound traffic,*

*as the figures show, furnishes all of the empty cars necessary on the coast for the shipment eastward of all of the traffic offered on the coast except lumber,* and lumber is the one form of traffic which can be pointed to as having caused the tremendous movement of empty cars westward on those lines.

Careful examination of this movement was made before these cases were tried and the exhibits show without question, and in fact *the finding of the Commission establishes it as a fact,* that the empty car movement is westbound in large volume; whereas, it is also a fact and *so found by the Commission,* that in 1893 when the reduction in this rate was made, the contrary was true and the movement of empty cars was altogether to the east.

The record contains a full statement of the effect of this lumber tonnage upon the expenditures out of capital by these lines in their efforts to take care of it. Line changes, lengthening of side tracks, passing tracks, reducing grades, boring of tunnels, the purchase of larger equipment, cars and locomotives, are among the different expenses which have been largely caused by this tremendous volume of lumber movement. The record shows that during 1906 and the first half of 1907, and in fact prior to that time, car shortages of acute character existed, and at times the northern lines were almost completely broken down with the excess of lumber traffic. The construction of the Spokane, Portland & Seattle road down the north bank of the

Columbia River was one of the larger expenditures made necessary chiefly by the growth of this business; and it stands without successful contradiction that largely because of the lumber traffic these roads have been overloaded and their capacity overtaxed, and as a result their cost of operation has greatly increased.

In the Oregon Case, No. 1327, the Commission said:

> "The density of traffic on the defendant lines has increased to such an extent that it is more than can be advantageously handled on single-track roads."

The foregoing in outline states the facts and the reasons whereby, because of this change in conditions and increase in cost, these lines concluded that it was no longer possible to continue the low scale of rates established in 1893. It had become apparent not only that the 40-cent rate was not paying for the cost of the business, but also that as long as it remained in effect it constituted a discrimination against other forms of traffic and that the lumber industry was obtaining its transportation without paying its fair share of the cost of operation.

The commission after hearing the cases, by a divided vote, authorized a portion of the increase demanded. Two of the Commissioners held that the entire advance was justified.

The Commission in the Washington case said (after defining the Pembina-Port Arthur line):

> "To certain points further east involving longer hauls, it is believed that there was justification for some advance in view of the less revenue per ton per mile accruing to the carriers from this traffic."

The Commission in the Oregon case, said:

> "The rates from said points of origin to points east of the line above-mentioned might reasonably be somewhat increased,"

and the increase of five cents referred to was authorized.

*THE DISSENTING OPINIONS.*

(Vol. A. No. 451 p. 62.)

The Chairman of the Commission, Mr. Knapp, together with Commissioner Harlan, dissented, and their dissenting opinion may now be referred to as containing their opinion that:

> "All the circumstances indicate to my mind that these rates when established were regarded by the carriers and by the shippers as well, as uncommonly if not abnormally low and that both parties apparently anticipated that at a later date they would be advanced. I cannot but believe that conditions have so changed since these rates were established as to justify the carriers in refusing to continue them in force."

And again:

> "I am therefore of the opinion that these conceded and significant changes in conditions warranted the defendants in increasing rates which were understood to be on a very low scale, when lumber was worth little more

than two-thirds its present value and when railway service was much more cheaply performed."

And finally:

"Taking into account all the transportation conditions, including the haul over two mountain ranges and over a long stretch of territory which furnishes little traffic, I am of the opinion that even the advanced rates are among the lowest on which any considerable volume of lumber is anywhere moved. They are the lowest rates, all things considered, which the defendants charge on that commodity; and relatively low in comparison with their rates on other traffic. The old rates may fairly be regarded as unreasonably low, even if they did not discriminate against other traffic, and I think the defendants were justified in applying a higher scale of charges."

Believing that the dissenting opinion expressed the only just result of the evidence, and that the majority opinion erred in refusing to permit the advance in rates as published in the tariffs of November 1, 1907, these bills of complaint were brought to enjon and set aside these orders.

Light may also be obtained for a correct understanding of the majority opinions, by a brief consideration of the reasons which led to these dissents.

Chairman Knapp said:

"A careful examination of the record shows that the contention of the complainants rests mainly, if not altogether, upon two propositions: (1) that the rates which were ad-

> vanced on November 1, 1907, had been voluntarily accorded for a considerable period of years and must therefore be regarded as reasonable; (2) that the earnings of the defendant carriers upon their entire business are so great as to afford ample revenue without advancing the rates in question."

We have here an instructive statement of the fair substance of the record before the Commission and of the grounds that led to the majority conclusion.

The dissenting Commissioners analyzed the record bearing upon these two grounds of the decision and pointed out,

> (1) that the explanation offered by the carriers for these advances in rates had been furnished and the reasons given were sufficient, whereby the presumption had been overcome; that it was clear that the old rates of 1893 presented an exceptional instance of very low rates because of peculiar conditions and that the change in conditions justified the carriers in refusing to continue them in force; and,
>
> (2) while it appeared to be true that large earnings from all business during recent years had been made by these carriers, permitting a substantial surplus therefrom, it was entirely clear that little, if any, of this surplus resulted from the transportation of lumber to the territory affected by the advance in rates, and they were unwilling to concede in view of all of the circumstances that the unreasonableness of the advanced rates could be inferred from the showing that the aggregate earnings from all traffic could be reduced without apparent injustice.

Further reference will later be made to this dissenting opinion, but it is of value here in determining the issues that were really determined by the Commission.

*THE MAJORITY OPINIONS.*

An examination of the majority opinion in each of the cases shows that the grounds thereof as pointed out by Commissioners Knapp and Harlan in their dissent, were among the main considerations to which the Commission addressed itself, but it is also plain that the Commission went further and fixed these rates mainly and with almost the single purpose, of determining what markets this lumber should reach, and what competition it should be enabled to meet.

The Oregon opinion recited numerous facts relating to the increase in the lumber industry and the extraordinary prosperity which it had enjoyed in the past few years; the advancing range of prices that the record showed, as well as the increase in the cost of manufacture and the average profits therefrom; the competitive area in which the Pacific Coast lumber competed with the yellow pine and white pine, and said:

> "A certain portion of the lumber manufactured on the North Pacific Coast can compete successfully with other lumber in any markets. They there produce certain dimensions and qualities that are produced to but a limited extent, if at all, elsewhere. These qualities

are the choice portions of the logs and necessarily in producing them a large quantity of common lumber is also produced or a great waste of material occurs. The widest possible market for their medium and common lumber is what the North Pacific coast lumber men need most and every market that can reasonably be opened to their common lumber operates to lessen the waste and destruction in the natural supply. From 30 to 50 per cent of the finished output of the Oregon mills reaches the territory affected by the increase in rates. The combined North Pacific coast interests market about 5,000,000,000 feet annually, as against approximately 19,000,000,000 feet of southern pine and white pine, which shows that the latter two predominate and fix the price in competitive markets. It is alleged by yellow-pine dealers that an advance of 5 to 10 cents per 100 pounds in their freight rates would drive them out of competitive territory.

"It is insisted by the defendants that the advance in the rates will not affect the entire output of the North Pacific coast, because at least 50 per cent of that output does not reach the affected territory. But it is clear that Pacific coast lumber sold in that territory must be the surplus that can not be advantageously sold in the nearby markets, and if that surplus is thrown into the nearby markets a lowering of prices would inevitably flow from the elementary economic law of supply and demand."

The opinion referred to a large amount of testimony and statistical information relating to the total operations of these carriers and their financial condition and held:

> "From this it appears that the schedule of rates applying to each defendant line as a whole furnishes sufficient revenue."

Again, the opinion after adverting to the presumption attaching to the long existence of a rate and the decision of this court in Interstate Commerce Commission against Chicago Great Western Railway Company, 209 U. S. 108, that an increase of rates by a carrier raises no presumption of wrong, states the contentions, as the Commission viewed them, as follows:

> "Under this presumption complainants contend that the old rates were reasonable and remunerative; that under them many mills have been built and large amounts of money have been invested which under the new rates will be lost because the mills can not find an outlet for their product in the territory affected by the advance in the rates; that the consumers in the affected territory are likewise interested; that the carriers should grant rates that will permit the widest possible competition in commodities; that the carriers' total incomes from their entire schedule of rates are sufficiently remunerative and profitable, and such being the case the carriers are estopped from increasing a rate on any commodity that will increase the income; that if the total income is sufficient they are not permitted to increase the rate on a given commodity that may be lower than the cost of transportation. To this last proposition we, of course, can not assent.
>
> "While denying an intent to claim that a rate on a commodity may be based upon the

profitable nature of an industry producing it, yet defendants indirectly advance that theory. They also insist that every commodity should bear its just burden of rates and that lumber did not bear its just proportion and that therefore the rates thereon should have been increased. If this is true, some other commodity is bearing too high a rate, but defendants have not suggested which one. They also insist that the changed conditions since the low rates were inaugurated required the advance Neither of the parties are right in all their contentions.

"The railroad rates from various points of production will determine so far as transportation is concerned the limit or the extent of the consuming territory which any given commodity can reach. In competition with others and in their desire for business, carriers may move a commodity as far as a remunerative rate will permit—that is, if the compensation is something above the actual cost of the service, and it may be doubted whether carriers can go to this extent if the equipment so used is thereby diverted from the demands of other traffic offered to the carrier. Points producing the same commodity may be widely separated and be served by different carriers. It is manifest that the rates of the different carriers serving the different points will likewise determine the limits of the common competitive territory of the commodities from such points of production. Competitive rates made by the several carriers serving the different points of production may be lower than they could be compelled to make. The law permits the making of a competitive rate to the extent above mentioned, but there is no law that requires the carriers to go to that extent. This controversy can not be determined wholly

> upon the ground that complainants have enjoyed the lower rate for many years and that interests have been built up thereunder and that loss of business, investments, profits, and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy. Neither do the interests of the public require that lumber should be transported at other that just and reasonable rates."

It may here be stated, that if the opinion as a whole taken in connection with the record made before the Commission, contains substantial evidence that the controversy was in fact determined "on the justness or reasonableness of the rates in controversy," this court will not weigh the facts to determine whether it would have reached the same conclusion. In that event the orders are not subject to injunction upon the ground that they were made in the exercise of a power of determining a proper policy for the carriers, or the competitive markets to which common lumber should be permitted to move in competition with other sources of supply.

In the Washington opinion the following language appears (Vol. A, 452, page 57):

> "The rates in effect prior to the advances complained of had been in force for long periods of time and in a few instances the carriers had voluntarily maintained rates lower than those in effect immediately prior to these advances. The lumber trade had adjusted itself to the conditions obtaining un-

> der those rates, so that the vast interests affected were in a large measure dependent upon the continuance thereof. The defendants derive a large proportion of their revenues from the lumber traffic, and it clearly appears that they have not only earned large profits on their general business, but that the transportation of lumber under the old rates yielded a commensurate part thereof, and a reasonable return for the service performed."

It will require an examination of the record to justly determine the controlling reasons for the decisions.

## *ISSUES IN THE CIRCUIT COURT.*

From the allegations in the bills and answers of the defendants, above recited, the issues in the court below seem to have been:

> (a) That the orders of the Commission were beyond its power because not based upon any proof that the advanced rates were unreasonable, but made for reasons other than those within their power and bearing upon the reasonableness of the rates for the services rendered.
>
> (b) Because, on the record made in the lower court, the advanced rates were in no wise unjust or unreasonable, and there was therefore a total want of power in the Commission, under Section 15 of the Amended Act to Regulate Commerce, to adjudge those rates unreasonable, and in lieu thereof, prescribe other and lower rates.

It should be stated here with frankness that these bills of complaint were filed before the announcement of the decision by this Court, on January 10th, 1910, in the case of Interstate Commerce Commission against Illinois Central Railroad Company, 215 U. S. 452, but the argument before the Master was made in the light of that decision, and it furnished the rule that was followed by the Master and the Circuit Court throughout the further conduct of the litigation. It will be seen that in view of the allegations in the bill and proof in support thereof, both the Master and the lower Court held that the action of the Commission in condemning the advance in rates to points east of the Pembina-Port Arthur line, was beyond its power or so unjust and unreasonable as to be beyond the substance, if not beyond the form of its power. In so far as the allegations in the bill tendered the issue in the lower court that the advanced rates were fair, just and reasonable as a matter of fact, to be tried independently by the court, the decision in the Illinois Central case put that matter at rest, and the case was determined by an inquiry into the record to determine whether the orders of the Commission were in substance within its power.

*THE RECORD IN THE LOWER COURT.*

The entire record made before the Commission was offered in evidence before the Master, and by stipulations entered into, a complete printed abridgment of that record has been agreed to and

is now before the court. It is contained in Volumes 3 and 4, pages 913 to 1623, of the Transcript in this Court.

In addition to the record before the Commission some additional evidence was offered before the Master. (Transcript Vol. 1 and 2.)

In the answer filed by the defendant Commission it is charged that these carriers have been enjoying ample and "munificent" returns.

In the light of the expressions contained in the dissenting opinion, that one of the controlling reasons for the action of the Commission was the contention of complainants before it, that earnings from all business had been sufficient without advancing these rates, this averment in the answer seemed to render it proper to show the facts in that regard.

The issue had been tendered before the Commission and was again tendered by it in the court below.

It was met by the carriers by the introduction of evidence establishing the value of their properties. This consisted of a full showing of the present cost of reproduction of the Northern Pacific and Great Northern systems; also of a showing of the value of those systems, derived from computations based upon market prices of stocks and bonds for a representative period, together with statements of financial facts and statistics relating to their incomes and expenses. (Vols. 1 and 2, Trans.)

In the determination of the reasonableness of a rate upon a single item of traffic, evidence of this character has been held to be remote and the master in his conclusions expressed that opinion; but the issue tendered by the answer of the Commission made this evidence pertinent.

It was offered to support the proposition that these companies have not in recent years been earning a fair return upon the present value of the properties and, therefore, have a legal right to advance a rate of this character already below a reasonable basis to more nearly a compensatory figure. This is particularly true in the face of heavy reductions in other rates that are now being made by State and Federal authorities, such for instance, as the sweeping reductions being made in the Spokane case (see recent opinions in that case, filed June 7, 1910, 19 I. C. C. 162, and June 22, 1911, 21 I. C. C. 400), reductions in class rates from Pacific Coast terminals eastbound, in Portland Chamber of Commerce against O. R. & N. *et al.* and Transportation Bureau of Seattle Chamber of Commerce against Northern Pacific Railway Company *et al.*, 19 I. C. C. 265; Commercial Club Traffic Bureau of Salt Lake City, Utah, against A. T. & S. F. *et al.*, 19 I. C. C. 219, 21 I. C. C. 400, freight and passenger rate reductions in the State of Minnesota, now pending in this Court (Simpson v. Shepard, Kennedy, *et al.*, Nos. 599, 560, October Term, 1911), and other similar reductions in other states through which the lines of these companies pass.

In addition to this character of proof there was additional evidence produced from traffic witnesses throwing further light upon the circumstances relating to these rates and the conditions under which they were originally made and have since been maintained.

This additional evidence is contained in the testimony of J. A. Munroe, Freight Traffic Manager of the Union Pacific R. R. Co., and J. G. Woodworth, Traffic Manager of the Northern Pacific Railway Company (Vol. 1, Transcript, pp. 299-424.)

## *THE MASTER'S REPORT*

The Master devoted a considerable portion of his report to a discussion of questions of law relating to the power of the Commission and the scope of the power of the Courts in reviewing orders made by it. These portions of the report need not here be considered. His findings of fact are found in Vol. A, No. 451, pp. 80-92. He adverted to the decision of this Court in Interstate Commerce Commission v. Illinois Central Railroad Company, 215 U. S. 452, and applying the rule therein, stated his conclusions of fact from his findings, on pages 104 to 114.

Laying aside his discussion of legal questions, we state the essential results of his conclusions of fact (pp. 105 et seq):

(a) The defendant in drawing the Pembina line, dealt with the case in a double aspect and the Master properly held that the same course was open to the Court.

(b) He adopted the rule in Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, as the basis upon which to proceed.

(c) He held that if it were the function of the Court to fix reasonable rates, it would be difficult to escape the conclusion that the rates ordered to the Pembina line were unreasonably low but under the guidance of the rule stated, held that the evidence was not so clear and conclusive as to justify a recommendation for an injunction against that portion of the orders.

(d) In ordering the rates restored to points on and west of the Pembina line, the Commission was presumed to have acted under its power of determining reasonable rates, and therefore, in ordering the 50 cent rate restored to Omaha for a typical distance of 1799 miles, it must be conclusively presumed that it determined 50 cents to be just and reasonable for that service.

(e) This conclusion furnished a valuable measure for testing its action upon rates to points east of that line, as for instance, St. Paul.

(f) He found that conditions affecting the haul of lumber to St. Paul were substantially similar to the haul to Omaha excepting that the haul, on the average, was longer to St. Paul.

(g) He examined the distances from various coast points to St. Paul and to Omaha and computed the earnings per ton mile and found that, in every instance, the distance to St. Paul was greater and the earnings per ton mile were less.

(h) He weighed all the circumstances in detail and found no reason in the record justifying the order requiring the carriers to accept 45 cents to St. Paul, while expressly holding 50 cents to be reasonable to Omaha.

(i) Under the express reason given by the Commission for permitting the advance of 5 cents, i. e. the longer haul and the lesser revenue per ton mile, he found its order, requiring the rate to St. Paul to be limited to 45 cents, to be conclusively unjust, unreasonable and arbitrary.

(j) By a like process of reasoning, he found that the action of the Commission, in condemning the rate of 60 cents to Chicago, was also arbitrary and unjust, and recommended an injunction against that portion of the orders affecting rates to points east of the Pembina line.

(k) Finally he concluded and so found, that as the rates on other kinds of lumber and forest products have a fixed relation to those on fir, and as the differentials in rates from the Spokane and Montana-Oregon territory have a fixed relation to those from Coast territory, there should also be an injunction issued, an-

nulling corresponding portions of the orders affecting rates on other forest products and differential rates from the other districts, to points east of the Pembina-Port Arthur line.

*THE OPINION OF THE LOWER COURT.*

After full hearing of exceptions by both parties (Vol. A, No. 451, pp. 120-142: 145-6) the lower court (composed of Circuit Judges Sanborn, Van Devanter and Hook) overruled all exceptions and filed the following opinion (Vol. A, p. 147-8), omitting caption of cases:

> "All the exceptions to the report of the master must be overruled. Those which challenge his finding that the reduction by the Interstate Commerce Commission on the fifty-cent rate on lumber to St. Paul and other points east of the Pembina line was arbitrary, so palpably unjust and unreasonable, and so discriminatory that it was beyond the power of the commission are overruled on the ground that this action of the commission was beyond its power or so palpably and gravely unjust and unreasonable as to be beyond the substance, if not beyond the form, of its power and upon the authority of
>
> Interstate Commerce Com. vs. Ill. Cent. R. R. Co. (30 Sup. Ct. Rep., 155); C. M. & St. P. Ry. Co. v. Minnesota (134 U. S. 418-452-456-457); Mo., Kansas Texas R. R. Co. et al vs. I. C. C. (164 Fed., 645); F. H. Peavy & Co. vs. U. P. Ry. Co. (176 Fed., 409-418-422).
>
> Let orders, therefore, be entered overruling the exceptions to the special master's report and let the proposed decrees be entered."

The following decree was thereupon entered in each of the cases (omitting captions, Vol. A, p. 150):

"This cause came on to be heard at this term and was argued by counsel; thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

"That the order of the defendant in the proceedings brought before it entitled Oregon & Washington Lumber Manufacturers' Association et al. v. Union Pacific Railroad Company et al., being I. C. C. No. 1327, dated June 3, 1908, as amended July 27, 1908, and as further amended September 1, 1908, and as further amended September 25, 1908; and the order of the defendant in the proceeding brought before it entitled Pacific Coast Lumber Manufacturers' Association et. al. v. Northern Pacific Railway Company et al., being I. C. C. No. 1054, dated June 1, 1908, as amended June 28, 1908, and as further amended September 1, 1908; and the order of the defendant in the proceeding brought before it entitled Western Oregon Lumber Manufacturers' Association et al. v. Southern Pacific Company et al., being I. C. C. No. 1331, dated June 1, 1908; and the order of the defendant in the proceeding brought before it entitled Potlatch Lumber Company et al. v. Northern Pacific Railway Company et. al., being I. C. C. No. 1348, dated June 2, 1908, as amended July 27, 1908, in so far as said orders, or any of them, require the complainants herein to cease and desist from enforcing the rates prescribed by complainants' tariff effective November 1, 1907, and to prescribe lower rates than those prescribed by said tariff from points in Washington, Oregon, Idaho, and Montana to points east of a line

drawn from Pembina, North Dakota, southward through Grand Forks, North Dakota, Moorhead and Breckenridge, Minnesota, Sioux City and Council Bluffs, Iowa, St. Joseph and Kansas City, Missouri, and thence to Port Arthur, Texas, along the Kansas City Southern Railway, be, and each of them hereby is, set aside and annulled, and the defendant and its members, their agents, servants, and representatives, are hereby perpetually enjoined and restrained from enforcing any of said orders in so far as they affect rates to points east of said line."

*BRIEF.*

The Court below, following the recommendation of the Master, declined to disturb the orders of the Commission restoring the rates to points on and west of the Pembina line. The Master concluded (Vol. A, No. 451, p. 107) that while "it cannot be denied that there was substantial evidence that the rates in question to Missouri river points are at least upon a low basis upon the traffic in question in these cases," the evidence on that branch of the cases was not so clear and conclusive, under the rule laid down by this court in Interstate Commerce Commission against the Illinois Central Railway Company, 215 U. S. 453, as to justify a recommendation that an injunction issue against that portion of the orders.

Upon these appeals, therefore, it follows that the action of the Commission, in determining the rates to points on the Pembina line and west

thereof, was within its power and was taken in the exercise of its power of determining reasonable rates for the transportation of lumber to those points. As no cross-appeal was taken by the carriers, the question upon these appeals, as we view it, relates to the character of the power exercised in fixing the rates to points *east* of the Pembina line.

The Commission declined to permit the advance claimed by the carriers, to these long haul points east of the Pembina line. It recognized a right to some increase and approved an advance not to exceed 5 cents per cwt. The reason given was because of the longer hauls involving less revenue per ton per mile.

Having permitted a portion of the advance claimed, the questions upon this appeal are narrowed to the inquiry, whether the court below erred upon the record in holding that, in so restricting the advance, the action of the Commission was "beyond its power or so palpably and gravely unjust and unreasonable as to be beyond the substance, if not beyond the form, of its power?"

## *PROPOSITIONS.*

We approach the discussion of this question by asserting two propositions:

> (1) By the measure of reasonableness *contained in the Commission's orders* restoring rates to points on and west of the Pembina line

and thereby establishing those rates as reasonable, the rates fixed by it to points east of that line, are conclusively unjust and unreasonable.

(2) The record made before the Commission did not warrant or justify its action in declaring the rates of November 1st, 1907, to points east of the Pembina line to be unreasonable. This follows for these reasons:

(a) The record before the Commission and its opinions, show that the cases were determined upon the Commission's views as to the broad policy that should be adopted in finding a market in eastern states for coast lumber, particularly common grades, and not under its power to fix rates for the particular service rendered. The Complaints show that the issues mainly tendered were those of equitable estoppel and policy, necessary or wise for the welfare of the industry. The evidence produced by Complainants before the Commission followed these lines.

(b) The carriers gave "a good reason" for the change in these rates (I. C. C. v. C. G. W. Ry. Co., 209 U. S. 108). If a presumption of reasonableness arises from the long existence of particular rates, it yields to the force of conclusive evidence to the contrary.

(c) The total earnings—gross or net—from all business of these carriers, or stated differently, the fact whether they were prosperous or the reverse, were facts having no practical bearing on the reasonableness of a rate on a single article of traffic.

*ARGUMENT.*

*A.*

The rates established by the Commission to points on and west of the Pembina line must be accepted on these appeals as just and reasonable. Omaha was apparently taken by the Commission as a representative point on this line.

In the Oregon case the Commission said (Vol. A, No. 451, p. 61):

> "It will be noticed that the old rate on fir lumber from Portland to the Missouri River was 50 cents per 100 pounds, and the short line mileage is 1,799 miles, or approximately 130 miles less than the short-line mileage from Seattle to St. Paul, and it is urged that the rate from Portland to Omaha should not exceed the rate from Portland to St. Paul. However, this 50-cent rate to the Missouri River, and also extending to Chicago, applied not only from Portland but from points on the Southern Pacific lines south of Portland as far as Medford, 359 miles, and while it may be that lumber produced that far south of Portland would naturally move southward, at the same time the rate was open from Medford. The record shows that at least as far as Cottage Grove, 150 miles from Portland, lumber moves via the Southern Pacific into Portland and east over the lines of the Navigation Company."

The rate fixed therefore from Portland to Omaha as reasonable for the transportation service of 1,799 miles was 50 cents per 100 pounds.

To points further east "involving *longer hauls*" higher rates were authorized "in view of the less revenue per ton per mile accruing to the carriers from this traffic."

But the haul from Coast points *to St. Paul is longer and the revenue per ton per mile is less.*

Nevertheless, the Commission permitted a rate not to exceed 45 cents per 100 pounds at St. Paul.

If 50 cents is reasonable for 1,799 miles to Omaha, 45 cents for the much longer haul to St. Paul is conclusively unjust and unreasonable.

In pursuing the consideration of this question we shall not limit the comparison to short-line distances but follow the course adopted by the Master and take an average of conditions. This is fair and in consonance with the remarks of the Commission regarding group systems of rates such as these are.

We quote the finding of the Master (Vol. A, No. 451, p. 108) in lieu of re-stating the facts:

> "In considering this branch of the case, it is to be understood that the distance from Portland to Omaha is but typical and illustrative, and that the same rate applies from many other coast points of production and to other Missouri River points of destination, resulting in a variety of combinations of distances varying within considerable limits. So, also, in considering the rates to St. Paul and Minneapolis, over the lines of the Great Northern and Northern Pacific systems, the same conditions are true. The coast rates apply to St. Paul, Minneapolis and Duluth from a variety of shipping

points in the coast territory reaching to the international boundary, so that as to the rates over these lines a variety of combinations of distance may be found. From Tacoma, Washington, to Minneapolis, via the Northern Pacific lines, is substantially 1896 miles; from Portland to St. Paul, via this line, it is 2052 miles, and as an illustration of longer hauls to St. Paul via this line, the distance from Astoria to St. Paul is 2072 miles. Substantially similar results are obtained upon the Great Northern lines.

"It is therefore not unfair to adopt an average of conditions, and, indeed, this seems to have been the basis upon which the defendant proceeded."

The Master computed the earnings per ton mile upon this traffic from representative shipping points to Omaha and Kansas City on the one hand and St. Paul and Minneapolis on the other. These computations are based upon distances and rates contained in the exhibits. Certain of them are stated at the foot of the map at the front of this brief, which was one of the Complainant's exhibits before the Commission.

The Master held (p. 106):

"The short line distance from Portland to Omaha is stated by the Commission in its decision in the so-called Oregon case (No. 1327) to be 1799 miles. From the exhibits offered before the Commission it appears that this is substantially correct, and that the 50-cent rate restored by the orders of the Commission results in revenue of 5.56 mills per ton mile. To

Kansas City, another Missouri River point to which the same 50-cent rate applies, the distance appear to be 2030 miles, with a resulting ton mile earning of 4.92 mills."

Again (p. 110):

"The revenue per ton mile, however, according to the Great Northern and Northern Pacific lines, even under the 50-cent rate published by them in their tariffs of November 1, 1907, is in many important instances measurably less than the revenue per ton mile accruing upon traffic to Omaha under the 50-cent rate approved to that point. Under the 40-cent rate the revenue per ton mile on traffic from Portland to St. Paul as shown by the record was 3.90 mills and under the 50-cent rate, contained in the tariffs of November 1, 1907, it would be 4.87 mills. From Tacoma to Minneapolis, as shown by the evidence, under the 40-cent rate the revenue per ton mile was 3.98 mills, and under the 50-cent rate would be 5.27 mills. Under the 50-cent rate approved from Portland to Omaha the revenue per ton mile is 5.56 mills. These figures may be taken as fairly representative of conditions and seem to clearly demonstrate that the revenue per ton mile earned by the carriers transporting this traffic to St. Paul and common points even under the 50-cent rate would be substantially less than the revenue per ton mile accruing to carriers in the traffic to Omaha, and, therefore if the reason given by the Commission for permitting an advance in rates to points east of the Pembina-Port Arthur line seem to it to be of sufficient weight to authorize their action in that regard, it is impossible to understand why the same reasons do not compel a recognition of the 50-cent rate to St. Paul as just and reasonable."

It is therefore undisputed, because based upon mathematical calculations from conceded distances and rates, that the average haul to St. Paul is much longer and the average revenue per ton mile substantially less.

These factors were *the reasons given by the Commission for permitting higher rates* than those prescribed to the Pembina line.

But it remains to consider the relative conditions of the haul to Omaha and that to St. Paul.

We first notice the remark in the Oregon opinion (above quoted) that "it is urged that the rate from Portland to Omaha should not exceed the rate from Portland to St. Paul."

The complainants made this contention before the Commission. Shippers on the Coast for some years had been using the abnormally low 40-cent rate in effect to St. Paul as an argument for the same rate to Omaha, a longer distance.

W. C. Miles (Vol. 3, Trans. p. 1170) testified:

> "The main object, as I understand, of opening the Portland Gateway was that we could make the railroad companies equalize the rates, and go to the Missouri River for 40 cents, the same as we went to St. Paul for 40 cents, which would give the fir men a chance to compete with the yellow pine men." (See also Emerson, p. 1184.)

Under authority of the stipulation in the record (Vol. 3, Trans. p. 911-2), we quote from brief of the Oregon Complainants filed with the Commission:

> "The shippers have always chafed under the difference between the rates of 50 cents to Missouri River points as against the 40-cent rate to St. Paul, *a longer distance*, and have endeavored to have this discrimination voluntarily removed, but thus far without success." (Mr. Teal's brief, p. 30.)
>
> "It will be seen that the Northern Pacific hauls not only 200 miles further for the same rate as the Union Pacific, but in nearly every instance on equal distances the *advanced* rates on the Northern are lower than the old rates on the Union Pacific system." (Mr. Teal's brief, p. 43.)
>
> "The Northern Pacific's advanced rates (which are generally lower than the old rate of the Union Pacific) according to its traffic officials, will enable that road to haul the necessary empties west and lumber east and make a reasonable profit. Does not this admission show beyond question that the advance in rates by the Union Pacific is absolutely without justification—is purely arbitrary—without regard to the rights or interests of the public?"
>
> (Mr. Teal's brief, p. 189.)

Inasmuch as the Commission fixed and established 50 cents to Omaha as a just and reasonable rate, the prayer of the Oregon shippers was not granted, but it is a plain deduction, so far as the *relation* of rates is concerned, that those shippers believed that there should be equal rates to the two points.

The Master said (Vol. A, No. 451, p. 109):

> "Before the Commission in these proceedings, the complaining shippers urged that there should be equal rates upon this lumber traffic from the coast to St. Paul and to Omaha. These shippers urged that the 40-cent rate in effect to St. Paul and Minneapolis prior to November 1, 1907, should be applied to Omaha and the Missouri River territory generally, and it is fairly to be inferred that this position was taken in accordance with a conviction that conditions commercial, as well as otherwise, were so alike as to require equal rates.
>
> "From the deliberate conclusion, however, reached by the defendant that the 50-cent rate was just and reasonable upon this traffic to Omaha it is plain that the 40-cent rate asked by the shippers could not be."

The Master found that rate conditions between St. Paul and Omaha on the one hand and Coast territory on the other have, on many other forms of traffic, been always the same, and that prior to 1893, there were equal lumber rates to those points from the Coast.

He held (Vol. A, No. 451, p. 108):

> "It will be recalled that prior to the reduction in 1893 by the Great Northern the basis of rates on lumber and forest products to St. Paul and to Omaha from the Pacific northwest was the same. The rate to each point was then 55 cents per hundred pounds. The reasons which led to the reduction in the rate to St. Paul at that time have already been considered, and the disturbance of the equal basis of rates to these points seems to have been the

result of competitive and market conditions of a special or exceptional character. It is understood that upon many other items of traffic rates between Omaha and St. Paul on the one hand, and the coast territory on the other, have always been the same, and, indeed, in the recent decision by the defendant of the case the City of Spokane, et al., v. Northern Pacific Railway Company, et al., decided June 7, 1910, 19 I. C. C. 162, rates on classes and commodities, generally, to Spokane territory are fixed upon the same basis from St. Paul as from Omaha. This decision involves westbound traffic, it is true, but in it the defendant used the following language, which seems to support the conclusion that in the absence of exceptional circumstances, rates applying between St. Paul and Omaha on the one hand, and points in the coast territory, as well as the Spokane territory, on the other, should normally be upon an equal basis.

"Thus the Commission said in the case above cited:

"'There is no condition of construction or operation, or financial result, which would justify the Union Pacific lines in maintaining a higher rate for 1500 miles from Omaha west toward Portland, than is maintained by the Northern Pacific and Great Northern for a corresponding distance west from St. Paul toward Seattle.'

"While, as stated, it is true that this observation relates to westbound traffic, and perhaps is not conclusive in considering this east bound traffic, it nevertheless is persuasive, and in the absence of anything in the record before the master indicating differences in conditions in the eastbound traffic to Omaha, as compared with the eastbound traffic to St. Paul, it may

> be regarded in connection with the other considerations referred to as an important matter for consideration.
>
> "The fixing by the defendant, therefore, of rates upon an equal basis between the points under discussion, and the equal relation of rates of long standing referred to in the oral argument between these points seems to lead to the conclusion that the transportation conditions applying between these points are substantially alike."

It is obvious from general knowledge, that the physical conditions affecting operation upon these transcontinental lines leading from the northwest, are substantially alike. They cross the same mountain ranges and the same long stretches of territory affording little traffic (Dissenting Opinion, p. 64). The Northern lines at times, may meet with more difficulties from snow and cold weather. In the Oregon opinion, the Commission said:

> "In 1906 the Great Northern by reason of snow blockades, expended over $950,000 in addition to loss through suspension of traffic."

The essential differences in condition affecting this traffic, however, are the longer haul and the greater west-bound empty car movement on the Northern lines, occasioned largely by the demand on the Coast for east-bound lumber loading. (See infra, Section B of this argument.)

These differences would appear to justify higher rates to St. Paul than to Omaha and certainly make

it plain that no lesser rates can under the law be justified.

In the tariffs of November 1, 1907, carrying the advanced rates, it will be noted that while the carriers to St. Paul published the rate on fir to St. Paul at 50 cents, the lines leading to Omaha advanced the rate to 55 cents. It will be urged that this relation was fixed by the carriers in recognition of a competitive differential necessary to permit coast lumber to meet northern pine in competition in Minnesota; and that the Commission in determining upon 50 cents at Omaha and 45 cents at St. Paul merely carried out the carrier's conception of a fair relation, but upon a lower basis.

It is sufficient to say that this was not a differential based upon market conditions and no suggestion can be found in the entire record that such was the purpose of the carriers. Neither can there be anything found in the opinions of the Commission advancing that idea. Indeed there would scarcely be found a more conclusive exercise of unwarranted power on its part than that which would result, if such had in fact been its reason for this marked disparity in rates. The express reasons given for permitting the 5-cent advance, however, negative any such purpose. Instead of permitting 50 cents at Omaha and only 45 cents at St. Paul because of competitive conditions at St. Paul that did not exist at Omaha, the Commission expressly stated that the reason was because of the longer

haul to points east of the Pembina line and the lesser revenue per ton per mile. Thus the Commission held that distance in the making of these rates was the prime consideration. Finally, so far as the relation established by the tariff of November 1, 1907, is pertinent here or indeed open for consideration upon these appeals, it is sufficient to point out that ever since 1893, these rates have been made by the St. Paul lines leading to Chicago via that gateway. The Omaha lines have had to meet the competition thus forced upon them. Therefore when the Northern lines advanced the St. Paul rate to 50 cents and the Chicago rate to 60 cents, the Omaha lines made a similar advance in the Chicago rate via that gateway. The considertions that led the Omaha lines to determine upon 55 cents locally to Omaha are not before the court upon these appeals; neither are there any questions here or in the record below, touching the questions of the divisions of the 60-cent rate between the carriers east and west of Omaha or the considerations upon which those carriers arrived at those divisions. The Northern lines do not go to Omaha, neither do the Omaha lines reach St Paul (the Burlington is only a connecting carrier and none of this traffic originates upon its lines). The Northern lines determined upon 50 cents as just and reasonable from the Coast to St. Paul. The lines from the Coast to Omaha considered 55 cents to Omaha to be reasonable. The Commission con-

sidered the 55-cent rate for the haul to Omaha and found it to be unreasonable. In lieu of that rate, it adjudged 50 cents to be fair. We earnestly insist that under the showing of the longer haul and the lesser revenue per ton mile to St. Paul it was the assertion of arbitrary and unreasonable authority to at the same time, and in direct opposition to the very reason stated, deny an equal rate on the traffic moving via St. Paul.

*B.*

Dealing with the second proposition, we come to a consideration of the state of the record before the Commission.

> (a) Complainants offered the evidence of one witness, Lew Anderson (Vol. 3, pp. 913: 1147), who asserted some knowledge and experience with rate matters. He produced many exhibits containing historical facts relating to these rates, compiled from tariffs. These facts were not in dispute. Exhibits 11 to 20 (Vol. 3, pp. 976-1011) and 23 to 26 (Vol. 3, pp. 1021-1023; 1147-1152) are comparisons of rates covering this traffic with various lumber rates from other portions of the country.

It is not necessary to deal with these exhibits in detail. The Interstate Commerce Commission has repeatedly held, and so have the courts, that comparisons of rates in different sections of the country, are of little if any value, unless it be shown that the conditions are substantially similar.

On cross-examination of the witness Anderson, it

was affirmatively shown that the rates he had selected did not present fair comparisons. (Vol. 3, p. 1024: 1126.)

No other evidence was offered by Complainants bearing upon the character of the advanced rates or the facts proper to be considered relating to the transportation service rendered. In this state of the record, it is not to be wondered that the Commission gave the evidence of this witness no weight.

In the Oregon case the Commission said (Vol. A, No. 451, Trans. p. 54):

> "Numerous comparisons have been furnished showing the rates from the yellow pine producing points to the territory affected by the advanced rates. They throw little if any light upon the question at issue except to show the ton per mile rates. In every instance, however, the haul from the yellow pine producing point is so materially less than the distance from the Pacific Coast points that the comparison is of little value."

(b) Other than the evidence of the witness Anderson and certain tables of statistics taken from the reports of the carriers, relating to earnings and operation, traffic statistics, etc., the record made by the Complainants before the Commission consisted wholly of testimony and exhibits from lumber manufacturers in the Coast territory. In the distribution of the evidence offered by the Complainants between the several cases, manufacturers from various portions of this territory were produced, several from the Willamette Valley, Portland, and other Coast points north thereof, to the vicinity of the Canadian boundary. The testimony of

these witnesses as shown in the agreed abstract, is contained in Volume 3 of the transcript, beginning with that of A. C. Dixon at page 1027 and concluding with that of J. H. Bloedel at page 1265. Among these witnesses were also several lumber salesmen and one or two lumber-yard men from Illinois and Iowa (George P. Rinn, page 1103; Arthur Nollau, page 1107; and John W. Barry, page 1258), and the publisher of a lumber publication at Portland, Oregon (George M. Cornwall, page 1112).

It is difficult, without expanding this brief to an undue length to reproduce in any concise form, the substance of the testimony of these witnesses. The proof of the proposition now under consideration involves the proof of a negative, that is, that the evidence of these witnesses contains no proof bearing upon the reasonableness of the rates of November 1st, 1907, for the transportation service rendered. The difficulty, however, may be substantially avoided by looking to the opinions of the Commission in the Oregon and Washington cases. This may at least be done, with perfect fairness to the Commission for the reason that in its answer (Vol. A, No. 451, p. 40, Par. XV) we find the following:

> "Defendant says that the facts shown by said investigation material to be considered by this defendant are stated fully, fairly and completely in said report."

We are, however, not content to leave the interpretation of these opinions wholly to the recitals

therein set forth and deem it essential to a correct understanding that there be some reference to the record before proceeding to the opinions.

A. C. Dixon (Vol. 3, p. 1027) and R. A. Booth (Vol. 3, p. 1071) testified in behalf of the Booth-Kelly Lumber Company, a large producer in the Willamette Valley, south of Portland Their testimony dealt in detail with the conditions, past and present, affecting the manufacture of their output and the general condition of the lumber industry in their territory. They spoke at great length of the vital statistics of the industry, the number engaged, the annual payroll, the character of the towns and population therein, showing their relation to the industry, discussed questions relating to logging and cost thereof, stumpage and changes in prices thereof, increases in cost of labor and all the main articles of supply, taxes, hazard involved in their investment, and competitive markets which they were able to reach. They dealt with the condition of the industry in the latter part of 1907 and discussed the question to what extent the closing of mills had been caused by the general financial disturbance in the country and the advance in the rates under investigation. They stated their average cost of production and average selling price, giving also prices of various typical grades of lumber, and comparisons with prices on similar grades from other competitive markets. Typical exhibits were offered showing percentage of shipments over

a period of years to various eastern destinations and typical cars shipped, showing weight, earnings per car, cost at mill and kinds of lumber shipped.

Edward D. Kingsley, Manager of the Bridal Veil Lumbering Company, west of Portland (Vol. 3, p. 1075), B. C. Miles (Vol. 3, p. 1095) Secretary of the Charles K. Spalding Company, Newberg, Oregon, 26 miles south of Portland, Phillip Buehner (Vol. 3, p. 1121) treasurer of the Eastern and Western Lumber Company of Portland, and president of the Oregon and Washington Manufacturers' Association, W. C. Miles, Globe, Washington, manufacturer of lumber (Vol. 3, p 1156), George H. Emerson (Vol. 3, p. 1173) Vice-President of the Northwestern Lumber Company on Gray's Harbor, J. H. Bloedel (Vol. 3, p. 1192) of the Larson Lumber Company, Bellingham, Washington, Everett G. Griggs (Vol. 3, p. 1231) president of the Pacific Coast Lumber Manufacturers' Association, and connected with the St. Paul and Tacoma Lumber Company, all testified to substantially the same effect, and their testimony is substantially all that was offered by the complainants. The evidence of the remaining witnesses, who were lumber salesmen and lumber yard men, followed the same lines and added no other features than those discussed by the witnesses named.

The substance of all of this evidence, when we lay aside statistics relating to the industry, and opinions, relating to its then condition, may be

fairly summed up in the assertions made, that in their opinion the success of the industry required the continuance of the old rates. It was shown by the witnesses that the production of lumber on the Coast had so expanded, that a large surplus of common grades was being produced which could only be marketed in eastern competitive territories, and that this could not be done except upon the old rates.

Thus, Mr. Dixon testified (Vol. 3, p. 1068):

> "Now I presume from our figures which I have explained and which I have not had time to total up, we will show something less than 50 per cent of our output shipped east of the Missouri river. In the case of some mills I am familiar with, the showing will be greater and in some less. I am unable to determine just what the average will be, but probably larger than ours.
>
> "I want to say that the price at which this, we will say, 40 per cent of our material, whatever it is, is sold at, determines the success or failure of the lumber industry on the Pacific Coast in my opinion. The 35 per cent that we sell at less than cost is sold close to the coast, or on the coast or locally, perhaps locally, some of it.
>
> "The percentage that we ship east carries with it a profit sufficient to care for the lumber shipped east, and to make up for the loss on the other lumber perhaps. If we cannot ship that percentage of our lumber we cannot in any way that I can see make up for the loss on the other. If we cannot ship that from thirty-five to forty per cent of lumber that

now goes east I am unable to see how we can operate unless we can dump that surplus, which we have been trying for years at great expense to work off, back on the coast markets. If we did this, there would not be any coast market in thirty days or less time because the coast is now absorbing all it can take care of."

And again (p. 1069):

"We are not making any provision for the waste. We just want a rate that we can do business on the same as we have been doing for the last ten years. We could sell the thirty-five per cent east if we had a low enough freight rate."

Mr. Kingsley testified (Vol. 3, p. 1079):

"Knowing as I do the conditions which will result and also the margin of profit that the business of these mills had been handled on in the past, from some little inquiry I have made of their business in the past, I should have considered it would have been a very poor business proposition to have invested money in the construction of this new plant there, had I known there was going to be an advance in freight rates on lumber. I do not think the management would have done so. I certainly should not have done so."

And again (p. 1080):

"Our nearby trade is very large, however, on account of our being an old established business. The reason why only 25 per cent of our output moves into the affected territory, it has such an effect upon the lumber business in the State of Oregon and of the entire northwest, is that you cannot cram the trade in the affected territory into the limited territory in the west. The class of lumber that moves

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largely into the affected territory, consists of what we call the upper grades. A very large per cent of manufactured lumber is a common grade of lumber, and we have to have a market for the other.

"Assuming that these rates stay in effect and assuming that the result of these rates will prevent shipments east to the affected territory, the effect in my judgment will be that it will be a case of the survival of the fittest; that a few of the stronger and larger mills will continue to operate, and the weaker mills will have to liquidate, which they cannot do, and probably go out of business. The final result of that process will be to simply throw the lumber industry into a few hands in my judgment. I believe it will wipe out quite a number of the mills that are not strong enough to go through the season. It will wipe out sufficient at least, to absorb this amount of lumber that has been going east."

Mr. B. C. Miles testified (Vol. 3, p. 1096):

"I should judge approximately thirty per cent of our shipments are into this affected territory. If the territory were cut off entirely so that under the new rates shipments could not be made, the effect would be that we could not run our mills. The thirty per cent taken away from our markets would force us to come in competition so severely in the territory left and the prices would so drop that we could not sell our stock at a profit."

George M. Cornwall, publisher of the Timberman, of Portland, testified to an investigation into the condition of the industry in Oregon in 1907, just prior to the hearing, and reported that he had

ascertained by reports, that more than 165 mills were then closed and others running on reduced time. This he attributed partly to the advance in rates and partly to the general financial disturbance. He expressed his opinion as to the effect of the advanced rates as follows: (Vol. 3, p. 1113).

> "Assuming that this advance in rates prevents shipping, in my judgment, it would simply amount to this: that if these mills which are closed, which are not possessed of a large amount of capital, there will be only one thing left for them to do, that will be to liquidate. The final effect would be they would go out of the lumber business, and there would be fewer people engaged in the lumber business in the State of Oregon."

W. C. Miles testified (Vol. 3, p. 1166):

> "I have heard of this advance in rates for several years; it has been a rumor all the time. It has been a general rumor in our country since the spring, published everywhere and talked about. It was discussed in the Association meetings, and from that time the orders began to slump off in this section of the country. The whole community is probably dependent upon that industry. It is my opinion that this increase in rates cannot be absorbed by the mills."

Similar testimony was given by the witnesses, Emerson (Vol. 3, p. 1175, 1178, 1181) and Bloedel (Vol. 3, p 1195-6: 1197-9).

Mr. Bloedel testified (Vol. 3, p. 1195) to investments made after discussing conditions with repre-

sentatives of the railroads, in past years, and while he does not claim that any assurances as to the continuance of rates were given, he stated (p. 1196):

> "Had there been at that time any question about the rates, I would not in any way have encouraged my partner to invest the money in this mill. There was nothing said about the rate one way or the other; it was largely a question of car supply. But the inference that we had, from doing business on that rate, a matter of about thirteen years, was that it would be reasonably continuous, and on that assumption we built the mill."

Again:

> "We feel that we made a foolish investment, in view of the raise. It is one that will now depreciate, that we will have no use for until the conditions in the lumber business change radically."
>
> (Note—An examination of such exhibits as Dixon No. 1, Vol. 3, p. 1045, Buehner Exhibit No. 1, p. 1125, in connection with the testimony of these witnesses and the recitals of facts in the opinions of the Commission, all showing increases in the cost of logs and expenses of manufacture much more in amount than the increase per hundred weight or per thousand feet resulting from the advanced freight rate, leaves some doubt at least about the correctness of these grave predictions.)

The opinion of the Commission in the Oregon case (Vol. A, No. 451, pp. 44 to 64 inclusive) contains an analysis of the testimony offered by the complainants and we assert that it may be searched

for evidence other than above indicated, excepting as it was offered by the carriers. The Commission found the facts relating to the history of the rates and the enormous increase under the old rates of the lumber industry. It stated the amount of the investment and annual output, the range in prices of stumpage, logs and lumber, the increase in the cost of manufacture and the average profits shown in the record. It stated the facts relating to competition of Pacific Coast lumber with that from other producing districts.

The Commission said:

> "The widest possible market for their medium and common lumber is what the North Pacific coast lumbermen need most, and every market that can reasonably be opened to their common lumber operates to lessen the waste and destruction in the natural supply."

And again:

> "It is insisted by the defendants that the advance in the rates will not affect the entire output of the North Pacific coast, because at least 50 per cent of that output does not reach the affected territory. But it is clear that Pacific Coast lumber sold in that territory must be the surplus that cannot be advantageously sold in the nearby markets, and if that surplus is thrown into the nearby markets a lowering of prices would inevitably flow from the elementary economic law of supply and demand."

The Commission then noted the evidence offered by the complainants showing the results of operations of the carriers from their total business and concluded that from this it appeared "that the schedule of rates applying to each defendant line, as a whole, furnishes sufficient revenue."

With this analysis of the complainants' proof the Commission proceeded to discuss the evidence offered by the carriers.

*SUMMARY OF EVIDENCE OF CARRIERS.*

Howard Elliott, President of the Northern Pacific Railway Company, testified (Vol. 4 p. 1372 et seq.) regarding the history of the old rate, the reasons which led to its reduction in 1893 (which will be hereafter adverted to), and the change in conditions which had since occurred.

He testified (p. 1374) to a critical comparison of the *comparative* cost of transportation over the lines of the Northern Pacific, Great Northern and Illinois Central lines, based upon his education as a civil engineer, a comparison of the profiles of these lines, and a consideration of certain comparative cost statistics prepared from published reports. This comparison was made for the purpose of reaching an approximate basis for reducing operating conditions on these three lines to a common ground. This afforded a fair means of comparing the reasonableness of the advanced rates of November 1st, 1907, with rates established and approved by the Commission for the transportation of yellow pine lumber over the Illinois Central and other

southern lines from McComb, Mississippi (a representative point of production), to Chicago, reported in Central Yellow Pine Association vs. Illinois Central Railroad Company et al, 10 I. C. C. 505. He reached the result that the comparative expense of hauling freight on the Great Northern and Northern Pacific was respectively 129 and 131 per cent of the cost on the Illinois Central line.

For the same reason, that is to say, for comparative purposes only, certain exhibits were offered by the carriers before the Commission by the witness Hinckley, Vol. 4, p. 1395-1406.

The Commission discussed Hinckley Exhibit 3, which is a table necessarily by approximation, of the *comparative* cost per loaded freight car mile, arrived at by dividing total operating expenses and taxes by mileage of loaded freight cars on the different lines in question. This exhibit was not offered as a basis for determining actual cost because, obviously, it was open to many objections if so offered, but as stated, it was offered as a basis of *relative* cost, computed for each line upon the same basis and therefore offered a comparison of some value, and consequently a means of comparing the rates in question with the yellow pine rates approved by the Commission.

The opinion of the Commission in the Oregon case, however, seems to have taken this exhibit, as well as others, as offered for the purpose of showing actual cost. It proceeds to deal with this and

other exhibits with the same mistaken idea, producing results of no apparent value to the question of the reasonableness of these rates; indeed, the Commission did not deem the results so drawn as of any value and properly said:

> "These calculations show how easy it is to play with figures and make them prove almost any desired result."

The purpose of the exhibits, as of the testimony of Mr. Elliott, was as stated, to offer a basis for comparison only, and in this aspect of the matter it does not appear that the Commisison gave these exhibits and testimony any consideration whatever. We may lay them aside therefore from further consideration in this brief. They are referred to merely to indicate a part of the carrier's proof; they throw no light upon the grounds of the Commission's orders, except as it appears that the Commission misunderstood the purpose of them. One other exhibit offered by the carriers and discussed by the Commission may be noticed before passing to a consideration of the findings of the Commission upon the essential facts upon which the carriers justified the change in rates.

Maguire Exhibit 3, Vol. 4, p. 1485, is a comparative statement of the earnings of a car engaged in hauling lumber with a car engaged in hauling other commodities on the Great Northern lines. (Opinion, Vol. A, No. 451, p. 54.) The con-

clusions reached by the Commission were based upon the use of *minimum* carload weights of these commodities as carried in the tariffs, which wholly ignore *actual* weights ordinarily moved. The exhibit shows the actual average weights of a very large number of cars of the different commodities and the actual earnings therefrom. It was argued, as the Commission notes, that minimum weights have little to do with actual average weights and although as the Commission says: "the tariffs establish the minimum weights," the exhibit clearly shows that upon east and westbound traffic both, the average earnings per car of these various commodities compared with lumber are much in excess of lumber earnings.

## *REASONS FOR THE ADVANCE.*

In accordance with the rule laid down by this Court there is no presumption that an advance in rates is wrongful, unjust or unreasonable. The carrier in such case is required upon proper inquiry, however, to explain its reasons for the advance and support its explanation by proof.

As the Court stated the rule (209 U. S. 119):

> "Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor; the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done."

The Commission in Memphis Cotton Oil Co. v. Illinois Central R. R. Co., *et al.*, 17 I. C. C. 313, thus interpreted this holding:

> "An advance in a long-established rate at once suggests the propriety of an inquiry of the carrier for a statement of its reasons for making the advance. But in making its explanation, if we correctly understand the meaning of the court in the case above cited, the carrier is not under the necessity of overcoming the technical weight and force of a presumption of law that the previously existing lower rate was a reasonable rate. The long continuance of a lower rate may be said to raise a presumption of fact that the advanced rate is unreasonable. But this in a sense is no presumption at all, for it can not carry us beyond the actual tendency of the fact itself to produce that belief in the mind of the investigator. The fact that the lower rate has long remained undisturbed has strong probative value. Considered merely as evidence, such a rate history, in the absence of some explanation that satisfies the judgment of the propriety and need of an increase in rates, would ordinarily have great force. But in every case we must consider and weigh all the other facts of record before arriving at the conclusion that the increase in rates was unreasonable and therefore unlawful."

In compliance with this rule the carriers appeared before the Commission and gave their reason for this advance.

*That reason was and is the increase in cost resulting from changed conditions.*

The increase in cost has been mainly brought about by (a) increase of wages; (b) increased cost of all materials and supplies; (c) reversal of empty car haul caused by lumber traffic; (d) enormous increase in expenditure out of capital to meet requirements of increased business, largely chargeable to the eastbound lumber traffic.

The reasons for the advance in rates were given by Mr. James J. Hill, chairman of the Board of Directors of the Great Northern Road. Each and every fact testified to by him was within his personal knowledge and experience.

Upon the question of the cost he testified that in 1893 lumber was very low (Vol. 4, p. 1267):

> "We bought fir lumber for five and five and a half and six dollars a thousand. We then saw that clear lumber, sway bracing, caps and stringers for trestles, without a knot, selling for $5.00, $5.50 and $6.00 a thousand.
>
> "After the financial depression in 1893 business was very dull on the Coast. Cedar shingles were manufactured and sold very low. In 1893 standing timber was very cheap. Some distance back from the road it was as cheap as 12½ or 15 cents a thousand. Nearer the railroad at what lumbermen called good chances, lumber could be had at 25 cents. The advance commenced almost entirely after 1897. The necessity for advancing the rate was the increase in the cost. The increase in the cost for the last eighteen months or two years has been from 30 to 40 per cent., and the heaviest increase has been in the last six or eight months. That consists of the increase in the

cost of supplies of every kind. There is a very great increase in the cost of supplies. A very large part of our supplies is lumber. All the organized branches of labor have been materially advanced. In 1892 when we were building we bought lumber out there for $5.00 a thousand and there was no depression. We were extending our railroad and so far as the lumber interest was concerned, it was a question of loading back cars. Standing timber was very much cheaper then than now.

"I question if expenses were ever lower than $1.00 per train mile. Our present rate—the cost—is about $2.00 a train mile. It has advanced very materially since that time. On some divisions it will run up to $2.25. According to the conditions now the cost is very, very much greater. It is greatly enhanced. I think the rate from the Pacific Coast east on lumber is a very low rate; the lowest rate that I am familiar with.

"If the railroad is built into a section of the country it has got to carry what that country produces or go without it. Now the question is if it can carry what that country produces and get a profit out of it and enable the producer to make a profit, both are on a sound basis. You cannot tell to an exact point whether you get a profit out of the movement of a particular commodity or not, but you can get it approximately. You have to consider the length of the haul. I should think that would be elementary. Up to a certain point you consider the tonnage. Up to a certain rate, up to a certain point the general rule is that the greater the tonnage the lower the rate, but when traffic increases beyond a certain point, then it adds to the expense, and it costs you more when you overload the machine, for carrying it.

"The reason why I think this is an abnormally low rate is because it brings us less than it costs to furnish the service. I can show that to the Commission now. The average distance between cities is about 2,000 miles, to the Coast, just about 2,000 miles. But, during the past summer I had occasion to look it up closely. I found we moved more empty cars over the main range and over the Cascade range west of the point involved in this question than we did loads. Now, to take a car out and back, every car that goes to one end must come back, they have to come back. It costs from seven to nine cents a mile on distances of four hundred to five hundred miles, and more, to haul freight cars. If the entire travel is 2,000 miles out and 2,000 miles back; then that car travels 4000 miles, and at seven cents a car mile it would be $280.00. It would cost that without any return for the use of the property, without any taxes—simply the money that is paid out to move that car. Put 50,000 pounds of lumber into that car at 40 cents a hundred, and you get $200.00. You have paid out $80.00 more for every car you have moved out at the minimum. Now, at some time in the year—take it in the winter months—the train load is lighter, it must be reduced on account of the extreme cold weather, and the cost is higher. I would say that about 7½ cents—from 7 to 7½ cents—and on many roads it is greater than that. I do not say that we have to haul all the cars west that come east loaded with lumber, empty. No, I said that we haul about one-half, and sometimes more than one-half of our westbound cars empty. That is to bring lumber back.

"What I wish the Commission to understand is that when we do carry an empty car over there and bring it back, haul it both ways, that

we lose from $80.00 to $100.00. Under those circumstances I mean to say that we are transporting lumber for less than the cost. Those circumstances very frequently occur. They have occurred every month in the last year, and as high as 60 and 70 and 80 cars a day.

"At the time the Great Northern was built through to the Coast there was very little lumber moving eastward. I do not think the rate was so high that lumber did not move eastward. There was very little increase in the movement of lumber east until the stumpage in the white pine districts of Minnesota, Wisconsin and Michigan very largely advanced. When I first went out there, I paid 90 cents a hundred for a carload of cedar from Westminster, at the mouth of the Fraser River, to Winnipeg. Before we put our road in, the rate had been reduced. Possibly the building of our road had something to do with it. It had been reduced to 55 or 60 cents, something in that neighborhood. I wish to state that for two or three years after the 40-cent rate was put in there was very little lumber movement eastward upon that rate.

"I say the wage rate has gone up in the last year very considerably. In the last year all wages of engine-men and train-men have been advanced, and of common labor very largely. Common labor up to $2.00 and $2.50 a day from $1.50, very hard to get and very indifferent labor at that. We employ Italians and give them $2.00 and as high as $2.50 a day. I think that within the past year there have been substantial increases. I think it was about a year since the locomotive engineers were advanced to $5.00 a day. Not $5.00 a day in hours. It is $5.00 per 100 miles, and when they run a passenger train 200 miles, which they usually do, they get paid for two days. The wages of

those engaged in operating the road as distinguished from construction men have been advanced during the past year. The section men have had the same rate of wages that other labor has had. The wages of the train crew are not the same as they were a year ago or two years ago. They have been materially advanced. The Commission was called in to settle some of those cases. There were advances to clerks and everything. The cost of living has materially advanced, and wages have also.

"In making my estimate showing $80.00 loss upon every car of lumber moved, I did not estimate that the car went from Minneapolis to the Coast empty. I said that the $80.00 or $100.00, or in some cases $120.00 would be the loss on the car that was moved empty in one direction. I paid a good deal of attention to that at times this summer, and sometimes I would find as many empties going west as loads, and some days more empties than loads. Any car that moves west empty and comes back with a load of lumber is carried at a loss.

"The empty movement west causes the increased cost of this traffic. I will explain that. If the westbound traffic made more empties on the west end than the lumber would load, all the roads would be glad to carry at 40 cents rather than bring the car back with nothing. The increased cost of the traffic is the cause of this advance, and the empty car movement is a part of the increased cost. The increased cost is the cause of this advance and the other is an element of that increased cost.

"All rates should be reasonably profitable. Taking this year as the basis, the 50-cent rate is a low rate but it is a rate that should be

compensatory. I think it would. At any rate, it would be more nearly compensatory than the existing rate.

"I said the lumber movement had increased the cost because of the increased number of cars required to be hauled west empty.

"One of the reasons for this increase in rate is to make up for an increased expense account on the Great Northern, on account of the haul, by reason of this expense, being unremunerative at this time. That is correct. The advance is to make a lumber rate compensatory, and not that other business in other states should contribute to carrying lumber for less than it cost. That is the fact today. There is no doubt about it.

"In some places it is true that a good deal of increased cost came from station service due to increased business; and in other places that would not apply. There is an increased cost on account of wages.

"Our train haul has constantly increased, and last year, including company freight and commercial freight, it would be whatever the report shows. Our cars have increased in capacity constantly, and we have spent large sums in improving our roadbed; also in making the rails heavier; all of that, and we have to even relocate new lines in the mountains, that we thought were at very low grades. We have also increased the car loads quite heavily. We have tried in every way to economize and to get more for the dollar we spend. If we should go back to 25 years ago and take the expenditures of that time, it would be quite large, and we have done everything we could to increase the load, to increase the carload and the train load. We have laid heavier rails. We have rebuilt sections of the road to get lower grades, and in that time our rates have

been reduced from 2½ cents a ton a mile to ¾ or about ¾ of a cent a ton a mile. I think the total reduction in twenty-five years would amount to $750,000,000.

"There was quite a sharp jump in our operating expense account in 1907 over 1906. The operating expenses were not written up at any time last year more than any other year before, but were written up just the same.

"Up to the extent that the road can move its trains with reasonable regularity, the increase in tonnage would be an advantage. The increase in tonnage would enable the road to operate for less. In other words, if everything is moving right on the road, not crowding it beyond its capacity, it would be a means to enable the company to move its traffic at a lower cost; but if crowded to an extent greater than the capacity of the road, it would increase the costs very quickly and very materially. For the year ending June 30, 1907, the ratio of operating expenses to gross earnings was higher than it has been for several years. Taxes are higher, too; taxes are constantly increasing. If these betterments and grade reductions, additions to equipment and other improvements had not been provided, the present rate of traffic would not have paid the expenses on the basis of twenty years ago."

Howard Elliott, president of the Northern Pacific Railroad Company, testified: (Vol. 4 p. 1372):

That one of the first questions that was presented to his attention when he became president of the Northern Pacific was the subject of the lumber rates from the Puget Sound Country east. He

attended a meeting in Tacoma in 1903 with the lumber men at which some were asking a reduction in the rates, and others increased facilities.

"And then I began to make inquiries as to the rate and to inform myself somewhat about it. It seemed to me then that the rate was very low, abnormally low, compared with the rates with which I had been familiar in other parts of the country. For several years I had been thinking about this lumber rate and some of the conditions that led me to think that our company was justified in making an advance can be briefly stated.

"The past history of the rate I think has been more or less touched upon. It was put in, as I understand it, fourteen or fifteen years ago, at a time when the cars on the Pacific Coast were not getting any return loads. It was obviously desirable to load those cars back if they could be so loaded.

"At that time, seven or eight or even five years ago, the Northern Pacific Railroad Company was not taxed beyond its reasonable capacity as a freight carrier, so it was justified, perhaps, in taking on, what might be called extra business at rates far below the average and in using facilities for the benefit of the patrons of the road, that otherwise would not have been used but might have lain idle. In the last two or three years those conditions have very radically changed. The company has been taxed far beyond its capacity, so that the lumber business can not in any sense be called extra business that the company would be justified in taking at an abnormally low figure.

"Another question that has come up to a very marked degree in the last two or three

years, more particularly in the last eighteen months, is that the general costs of conducting the railroad business in the United States and in the northwest particularly, have shown very marked increases. Now, this great increase in business, and particularly in the lumber business—has forced the railroad company, in an honest effort to look after it, to make very large investments in its property. Our company, I think, has spent in the last five years for equipment and additions to its track, and improvements of that sort, approximately seventy-five million dollars, in order to increase our ability to produce the required amount of transportation demanded by the country, through which the road runs. That sum of money has been spent all along the line, but a very large part of it has been spent west of Billings, Montana, and a very large part of it was induced, or the decision to make a very large part of that expenditure was induced by the thought of trying to provide additional facilities to help handle the products of the country, of which lumber is one of the most important.

"Some return must be obtained upon that investment, some consideration must be given to those very large investments.

"My personal opinion,—and it is always hard to bring actual proof of such a thing, but my personal opinion is—that in the last eighteen to twenty-four months we have not got a new dollar for an old one from the lumber business on the Pacific Coast. We have tried to do the best with it we could, and some of these gentlemen know that they have made us feel very uncomfortable because we were unable to furnish them with the facilities that they naturally desired for the proper expansion of their business.

"The empty haul west was not the sole cause for this advance in rate; it is one of the causes. I think the advance will put us in a much better position to bear the burden of taking empties, than we were in before. Even on a 50-cent rate I am not clear with the way our expenses have increased, that we would be justified in hauling empties all the way to the Coast in order to get lumber. The lumber tonnage has exceeded our capacity to handle the traffic for the last eighteen months.

"I think our charge for labor on the whole is higher than any other part of the United States except perhaps on some of the Southern Pacific lines in California and Arizona. Our average operating ratio has been below the average. The increase in cost is one of the reasons why I think this rate should be advanced; general increase in cost in conducting the railroad business. The empty car haul contributes to the increase in cost. Also the competition of traffic; the fact that we have more than we can handle. We think the lumber business for the last two years has been so great that it has added to the cost of our operations and hampered us in transporting business, and if it had been somewhat less, the results to us would have been much better. We did not try to limit it. We did everything we could to help it.

We wanted the lumbermen to go on and do their business.

There has recently been some decline in wages of what you may call common labor, but there has been no decline so far as to be effective in the prices that we are paying for materials. Our tie contracts that we made for 1908 are on just as high a basis as in 1907. I doubt very much whether the wages of the men

in what are called the organized trades, will show any reduction unless times get very much more serious than they are now.

"The ordinary arrangement of the ordinary trades in our country is that they are supposed to be for a year; but either side can give thirty days' notice in most of them, and call for a hearing, call for a negotiation either for an advance or for a reduction. Of course, for the last few years we have had notices in between the yearly dates for advances, and have had to make them, more or less; and as already stated, I doubt if any reductions can be made unless the general conditions in the country are very much more serious than they are to-day. I don't think the labor organizations will stand for it. I don't know that they ought to.

"In the lumber business there is an element of expense which does not exist in any other business. We have very often to switch out carloads of lumber because of the fact that the load has shifted, and we have to put the car on the sidetrack and arrange to load, put it in order, so that the car will run safely.

"In 1903 the train movement was 94.25 miles per day, and 1906 it was 86 miles. That decrease in the car movement increased our expenses, because we had to have more space for cars to stand around, more yards to hold them. We had to have a larger equipment to do the given volume of business, and that meant more car repair and more inspection.

"The maximum of loaded cars west of the Cascade Mountains in the winter of 1907, waiting to be moved, was about 5,000. These cars would be about 45 feet long, so that we had about five thousand times 45 feet, that much space occupied with cars on sidetracks west of the Cascades. We had not shortage yards

in which those cars were placed; and, I am sorry to say, they were strung all the way from South Bend to the top of the Cascade Mountains. At Gray's Harbor the sidetracks were full, at Tacoma the sidetracks were full, and at Seattle the yard was full of those cars. That increased our expense because it made it more difficult to get trains over the road. Instead of having passing tracks, we will say, every five miles or so, those tracks being occupied by cars, the trains might have to run ten or fifteen miles to find a place to meet, and in that case one train would have to wait until the other one got there, and there was a great deal more dead time. That led to overtime on the part of the employes. And there was increased consumption of coal, and we did not get the benefit of the coal while it was being burned to the same extent. An engine burns coal on the sidetrack, and that engine has not been performing any service. Of course, we lost the time and usage of our cars."

W. G. Johnson, Assistant Comptroller of the Northern Pacific, offered certain exhibits in evidence bearing on the increases in cost.

Johnson Exhibit No. 1 (Vol. 4, p. 1415) is a comparative statement for the years 1898 to 1907.

In 1898 it required 13.26 per cent. of earnings for the maintenace of way and structure; in 1907 it required 13.25 per cent. of all earnings to maintain way and structures, demonstrating that notwithstanding an enormous increase in the volume and density of traffic and consequent increase of gross earnings the Northern Pacific Company was

unable to maintain its way and structures with any less percentage of its gross earnings in 1907 than it was in 1898.

In 1898, the average daily wage in the department of maintenance of way and structures was $1.57; in 1907, it was $1.84.

In 1898, the average price of rails per ton was $19.11; in 1907, it had increased to $29.49.

In 1898, the average price of fir ties was 22.3 cents; in 1907, it had increased to 38.3 cents.

In 1898, the average price of all ties was 23.5 cents; in 1907, the average price of all ties had increased to 43 cents.

The general expenses in 1898 required 2.81 per cent. of the earnings; in 1907, but 1.56 per cent.

Summarizing this exhibt it appears that the percentage of earnings required for maintenance of way and structures remained practically stationary, with no saving in the presence of increased earnings and traffic, and general expenses were decreased 1.25 per cent.; but average daily wage increased 17.20 per cent.; average price of rails per ton increased 54.32 per cent., average price of fir ties increased 71.75 per cent.; and the average price of all ties increased 82.98 per cent.

Johnson Exhibit No. 2 (page 1417) shows the ratio of conducting transportation and maintenance of equipment for the fiscal years 1898 to 1907; also the average daily wage paid men in those departments, and the average price of coal per ton.

In 1898, it required 30.74 per cent. of earnings to conduct transportation and maintain equipment; in 1907, it required 40.13 per cent. of earnings for that purpose, an increase of 9.39 per cent.

In 1898, the average daily wage for the maintenance of equipment was $2.02; in 1907, it was $2.35; or an increase of 16.34 per cent.

In 1898, the average daily wage for conducting transportation was $2.35; in 1907, it was $2.77; or an increase of 17.87 per cent.

In 1898, the average price of coal per ton was $1.73; in 1907, it was $2.39; or an increase of 38.15 per cent.

Johnson Exhibit No. 3 (page 1419) is a statement showing the changes in freight cars and locomotives, 1898 to 1907.

On the Northern Pacific in 1898, there were 18,477 freight cars; in 1907, this had increased to 42,320, or an increase of 129 per cent.

In 1898, the total capacity of all freight cars in tons was 399,176 tons; whereas in 1907, the total capacity was 1,422,503 tons, or an increase in capacity of 256.36 per cent.

In 1898, the average capacity per car in tons was 21.6 tons; whereas in 1907, it had increased to 33.6 tons per car, or an increase of 55.6 per cent.

In the matter of locomotives this exhibit shows that in 1898, the Northern Pacific owned 542 locomotives, but in 1907, this had increased to 1,255; or an increase of 131.5 per cent.

The weight on drivers in pounds increased from 44,432,965 pounds to 163,924,173 pounds, or 268.92 per cent.; and the average weight on drivers per engine in 1898 was 81,980 pounds, and in 1907, it had increased to 130,617 pounds per engine; or an increase of 59.37 per cent.

These exhibits also reflect efforts made by expenditures out of capital and income to increase the capacity of the road to handle traffic.

Johnson Exhibit No. 5 (page 1424) compares the years 1898 to 1907 in the ratio of all operating expenses to earnings, in the reduction in the average revenue per ton mile, and the relation of tons of lumber and other forest products carried, to all tons of freight carried.

In 1898 the Northern Pacific Road operated for 46.81 per cent. of its earnings; in 1907 it required 54.94 per cent. of earnings to operate the road.

In 1898 the average revenue per ton per mile was 1.065 cents; whereas in 1907 it had been reduced to 0.866 cents.

In 1898 of all tons of freight carried, lumber and forest products were 26.14 per cent.; in 1907 the ratio had increased to 37.38 per cent.; and in this connection it is to be noticed that in the year 1904 the ratio was 39.79 per cent, and in 1906, 38.82 per cent. The evidence shows that the falling off in 1907 was not due to any shrinkage in the volume

of the lumber traffic offered, but to the stress of severe winter conditions and the inability of the road to handle its traffic.

Reducing the foregoing figures to percentages, the ratio of operating expenses in 1907 had increased 8.13 per cent. whereas the average revenue per ton per mile had decreased 18.68 per cent.; the volume of lumber and forest products tonnage had increased 11.24 per cent.

In 1898 the Northern Pacific expended 2.68 per cent. of its gross earnings to care for depreciation of equipment; and in 1907 2.95 per cent.

Taxes in 1898 required 2.88 per cent. of earnings; and in 1907 required 3.50 per cent. of earnings.

Summarizing this exhibit it appears that in 1898 to pay all expenses, depreciation and taxes, it required 52.37 per cent. of earnings; but in 1907 for that purpose it required 61.39 per cent. of earnings, leaving in 1898 as net earnings 47.63 per cent., but in 1908 only 38.61 per cent.

As showing the character of the earnings on the lumber traffic as compared to earnings on other freight, a comparison was made between the years 1904 and 1906, as shown in Johnson Exhibit 6 (page 1426).

In 1904, the average rate per ton per mile on Pacific coast lumber and shingles was 5.15 mills per ton per mile; whereas the average earnings on all other freight was 1.017 cents per ton per mile.

The average earnings on all freight was 8.80 mills per ton per mile; that is to say, the Pacific coast lumber was carried for 3.65 mills per ton per mile less than the average of all freight.

In 1906 the average revenue per ton per mile on Pacific coast lumber and shingles was 4.57 mills per ton per mile, a decrease of .58 of a mill per ton per mile. All other freight paid 1.016 cents per ton per mile, and the average of all freight in 1906 was 8.28 mills per ton per mile; that is to say, the average earnings on lumber from the Pacific coast in 1906 was 3.71 mills per ton per mile less than the average earnings on freight per ton per mile.

J. G. Woodworth, Traffic Manager of the Northern Pacific, testified (page 1441) regarding the circumstances existing at the time the 40-cent rate was put into effect.

Woodworth Exhibit No. 5 is a statement taken from the records of the Northern Pacific Company showing actual prices paid for lumber f. o. b. Pacific coast points for the years 1896 to 1907, a period of twelve years.

In 1896 car siding cost $10.00 per 1,000; in 1907, $18.00 per 1,000.

In 1896 car roofing was $8.00 a thousand; in 1907 it was $14.00 per 1,000.

In 1896 car sills cost $7.00 per 1,000; in 1907, $20.00 per 1,000.

Cross ties in 1896 cost 18 cents apiece; in 1907, 50 cents apiece.

Timbers, 12 by 12 inch, 32 feet, in 1896 cost $5.00 per 1,000; in 1907, $12.50 per 1,000.

Stringers, 9x18—32 feet, in 1898, cost $7.00 per 1,000; and in 1907, $14.50 per 1,000.

The significance of this exhibit is that with decreasing revenue per ton mile on the railroad and a constantly increasing percentage of gross earnings required to move business, the railroad had been compelled to pay for different kinds of lumber used in construction, over 100 per cent. increase, and this mostly to the lumber men complainants in this case. The increase in expenses in the lumber business has undoubtedly kept pace with that in the railroad business; but the difference between the lumber interests and the railroads is *that the price of the output of the lumber manufacturer has more than doubled, whereas the revenue of the ton-mile output of the railroad has greatly decreased.*

A. G. Maguire, Assistant General Freight Agent of the Great Northern Railway, testified (page 1476) to certain statements prepared from the records of that company. Those relating to the increases in cost of wages and materials are as follows:

Maguire Exhibit No. 5 (page 1493) is a comparative statement showing increase in wages taking the month of May in the years 1902, 1906 and 1907; also the month of October, 1907. This exhibit is too long to receive extended comment here,

but comparing May, 1902, with October, 1907, on certain selected employes, the following increases appear in percentages.

| | Increase Percentages. |
|---|---|
| Road Engineers, | 10 per cent. |
| Road Firemen, Standard Engines, | 15.2 |
| Road Firemen, Moguls, | 25 |
| Road Engineers, Consolidation Engines, | 30 |
| Hostlers, | 37.2 |
| Freight Conductors, | 22.2 |
| Freight brakemen, | 19.1 |
| Yard Service Locomotive Engineers, | 25 |
| Locomotive Firemen, | 18.4 |
| Yard Masters, | 24.4 |
| Switch Foremen, Day, | 29.6 |
| Switch Foremen, Night, | 27.6 |
| Switchmen, Day, | 28 |
| Switchmen, Night, | 25.9 |
| Switch tenders and tower men, | 34.9 |
| Agents and operators, | 34.3 |
| Station laborers, | 19.4 |
| Section foremen, | 24.4 |
| Section laborers, | 36.2 |
| Foremen, extra gangs, | 26.5 |
| Laborers, extra gangs, | 32.7 |
| Teams, | 30.3 |
| Steam shovel engineers, | 26.7 |
| Steam shovel watchmen, | 25 |
| Bridge watchmen, | 23.8 |
| Master mechanics, | 15.5 |

| | Percentages. Increase |
|---|---|
| Shop foremen, | 15.9 per cent |
| Machinists, | 37.5 |
| Machinists helpers, | 29.7 |
| Blacksmiths, | 30.6 |
| Boilermakers, | 39.7 |
| Painters, | 21.2 |
| Other shop employes, | 24.4 |
| Other round house employes, | 30.7 |
| Superintendent's chief clerk, | 23.8 |
| Chief dispatchers, | 13.8 |
| Trick dispatchers, | 16.7 |
| Telegraph line men, | 12.4 |
| Telegraph climbers, | 18.9 |
| Storekeepers, | 22.5 |
| Coal heavers, per month, | 18.8 |
| Coal heavers, per day, | 72.4 |

R. B. Miller, General Freight Agent of the O. R. & N. Company, testified (page 1498) to the same effect.

We do not further pursue the quotations of evidence or exhibits from the record relating to increases of cost of labor and materials but turn to the findings of the Commission. Passing the findings of increase in cost of lumber manufacture and selling prices as incident to that industry equally with others, we quote from the Oregon opinion (Vol. A, No. 451, p. 50):

> "The expense of operating railways has increased greatly in the past few years, especially the cost of labor and materials. The in-

creased business has required additional working force and equipment, which has helped to swell the total expenditure, but the extra expense of increased force and added equipment has found reward in increased business."

(Note.—It is difficult to justify this latter conclusion in view of the evidence. To illustrate, if in 1898 it cost the Northern Pacific 14.52 cents for each dollar of earnings to move its business, and in 1907, 21.45 cents out of each dollar of earnings, it would seem that notwithstanding the increase in earnings and in density, the relative cost of moving business had largely increased; or as shown by percentages, that it had increased, in spite of economies resulting from better methods and increased density, 47.73 per cent.)

In the dissenting opinion it is said (p. 63):

"That the cost of railroad operation has greatly increased within the last few years is a matter of common knowledge, and it is unnecessary to more than allude to a fact with which every well-informed person is familiar. I am therefore of the opinion that these conceded and significant changes in conditions warranted the defendants in increasing rates which were understood to be on a very low scale when lumber was worth little more than two-thirds its present value and when railway service was much more cheaply performed."

## II.

### *THE EMPTY CAR MOVEMENT.*

Mr. James J. Hill in his testimony stated in concrete form the bearing of the question of the empty

car haul upon the increase in cost of operation, and upon the increase in the cost of handling lumber traffic, when he said, (page 1286):

> "The increased cost of the traffic is the cause of this advance, and the empty car movement is a part of the increased cost. The increased cost is the cause of this advance, and the other is an element of that increased cost."

Commenting upon this subject, he testified (Vol. 4, P 1268):

> "The additional cost of handling the property not only justifies but demands the change. The additional cost is more than the proposed change. Commencing in 1893 the amount of this business moved by the railroads was very little. As late as 1897 I think that on the Great Northern fifteen or twenty cars a day went east. This year at times as high as one hundred and seventy-five or two hundred cars a day have gone east. At times on the Cascade Range, where there is a tunnel nearly three miles long, it is very easy to reach the capacity of the Great Northern Railroad, especially if the wind is blowing from the east. On such occasions it takes that tunnel two or three hours to clear after a train goes through, owing to the length of it. When the cold days come it clears out sooner. We have handled over 200 cars in a day. The superintendent said 125 cars a day was the capacity. I did not believe that was so. We are now building an electric plant, installing electric power and engines, and will use electricity in the tunnel. to avoid that question. We can then handle 300 cars loaded in each direction. That would be 600 cars a day altogether."

And again (page 1277):

> "The average on the Great Northern would not bear much relation to the average on some

portions. Take the average from east of the main range of the Rocky Mountains to the coast. At times there are more empty cars; in the last summer there were more empty cars than there were loads."

And again:

"The reason why I think this is an abnormally low rate is because it brings us less than it costs to furnish the service. I can show that to the Commission now. The average distance between cities is about 2,000 miles, to the coast, just about 2,000 miles. But, during the past summer I had occasion to look it up closely. I found we moved more empty cars over the main range and over the Cascade range west of the point involved in this question than we did loads.

"I do not say that we have to haul all the cars west that come east loaded with lumber, empty. No, I said that we haul about one-half, and sometimes more than one-half of our westbound cars empty. That is to bring lumber back.

"What I wish the Commission to understand is that when we do carry an empty car over there and bring it back, haul it both ways, that we lose from $80 to $100. Under those circumstances I mean to say that we are transporting lumber for less than the cost. Those circumstances very frequently occur. They have occurred every month in the last year, and as high as 60 and 70 and 80 cars a day."

And again:

"I paid a good deal of attention to that at times this summer, and sometimes I would find as many empties going west as loads, and some

days more empties than loads. Any car that moves west empty and comes back with a load of lumber is carried at a loss.

"The empty car movement west causes the increased cost of this traffic. I will explain that. If the west-bound traffic made more empties on the west end than the lumber would load, all the roads would be glad to carry at 40 cents rather than bring the car back with nothing. The increased cost of the traffic is the cause of this advance, and the empty car movement is a part of the increased cost. The increased cost is the cause of this advance and the other is an element of that increased cost."

And again (page 1287):

"I said the lumber movement had increased the cost because of the increased number of cars required to be hauled west empty. The lumber movement has increased since 1898. On our road I should say we were hauling then fifteen to twenty cars. Some days we might have got up to twenty-five. It has increased up to one hundred and fifty to two hundred."

And again (page 1300):

"We have always tried to credit the lumber movement with the supplies that go westward and are needed in that business. We have always tried to impress upon the merchants of the coast the importance of trying to make every empty car good, because it enables us to furnish an empty car to load lumber back, and to pay that much more money out in the country."

Howard Elliott, President of the Northern Pacific, testified (page 1372):

> "The past history of the rate I think has been more or less touched upon here. It was put in, as I understand it, fourteen or fifteen years ago, at a time, when cars on the Pacific coast were not getting any return loads. It was obviously desirable to load those cars back if they could be so loaded."

Again (page 1390):

> "The empty haul west was not the sole cause for this advance in rate. It is one of the causes. I think the advance will put us in a much better position to bear the burden of taking empties, than we were in before. Even on a 50-cent rate, I am not clear with the way our expenses have increased, that we would be justified in hauling empties all the way to the coast in order to get lumber."

We do not pursue the examination of the evidence showing the empty car haul now involved in this east-bound lumber traffic, other than to refer to the testimony of A. G. Maguire and Maguire Exhibit 1, (Vol. 4, p. 1476 et seq.) showing the trend of the empty and loaded car mileage on the Great Northern lines during each year 1893 to 1907. We also direct attention to the table at the foot of the exhibit showing, by actual count, the empty and loaded cars that passed through the Cascade tunnel (on the line in Washington) for six months ended October 31, 1907.

In the month of May, 1907, 29 cars a day passed empty west through the tunnel and two cars a day empty east.

In June there were 66 west-bound empty cars per day and one empty car per day east.

In July there were 89 empty cars per day west to 3 empty cars east.

In August there were 54 empty cars west to two empty cars east.

In September there were 35 empty cars west to four empty cars east.

In October there were thirteen empty cars west to four east.

By the month of September the effect of the financial panic over the country had shown itself upon the volume of the lumber traffic, and from that period on until the end of the year and thereafter, on account of that cause, there was a lighter movement and a consequent lessening of the demand for cars on the coast for lumber loading.

Maguire Exhibit No. 2 (page 1481) contains a statement of the tons of Asiatic import and export tonnage, the chief importance of which at this period may be stated to be that it shows how insignificant as compared to the total tonnage east and west-bound, this foreign tonnage is. The import tonnage calls for empty cars on the coast for east-bound movement, and an examination of the figures relating to it shows how inconsiderable it is and how few the number of cars are that are required to move it east.

## *FINDINGS OF COMMISSION REGARDING EMPTY CAR HAUL.*

Commenting upon the effect of these figures, the Commission in the opinion in the Oregon case, says: (Vol. A, p. 47).

> "The superseded rates were made voluntarily by the carriers, the St. Paul rate having been inaugurated by the Great Northern in 1893, at a time when its empty car movement was east-bound and for the alleged purpose of getting loading east for those empties. The Northern Pacific and other lines in the territory affected by it were obliged to meet that rate in order to handle any of that business. It is shown that now the empty car movement is west-bound, and defendants contend that it is due wholly to the increased output of lumber. Other western products for eastern markets as well as Asiatic import traffic have also increased, and the record does not show what proportion of the predominating west-bound empty car movement is due to increased lumber production."

The Commission again says (p. 58):

> "The defendants urge with great vigor that the empty east-bound car movement prevailing at the time of the establishment of the 40-cent rate was the principal factor influencing the establishment of that rate and as the empty car movement is now west-bound, a condition has arisen which was not contemplated at the time of the establishment of the 40-cent rate. An examination of the records of the various defendants shows that the empty car movement is now west-bound."

Again:

> "The defendants contend that the predominating west-bound car movement is due solely to lumber, while complainants contend that it is not, and while there can be no doubt but what the 40-cent rate was made at a time when the empty car movement was east-bound, yet it would seem from the records that the predominating west-bound car movement cannot be charged wholly to the increased east-bound movement of lumber and forest products."

In case 1329, the Washington case, the Commission again said: (Vol. A. No. 452, p. 53):

> "In the year 1890 there was a decided predominance in the empty car movement eastbound, this amounting at that time to about 161.17 per cent, over the west-bound empty car movement on the Northern Pacific Railway. In 1891 the predominance of the east-bound empty car movement over west-bound had decreased to 72.17 per cent., and in 1892 it had further decreased to 4.35 per cent. The statement submitted by the Northern Pacific Railway shows that in 1893 and during all subsequent years down to 1907 conditions have been reversed and during this entire period there has been a large predominance of the west-bound empty car movement over eastbound."

The fact of the marked reversal of the empty car haul was thus found as a fact. To an extent, the Commission appeared to be unwilling to concede to the lumber traffic, the entire responsibility for this great change in conditions. We do not ask this

Court to weigh controverted questions of fact but merely for the moment to examine the undisputed proof in the following exhibits:

| | |
|---|---|
| Johnson Exhibit 11, | Vol. 4, p. 1440. |
| Woodworth Exhibit 6, | " 4. p. 1457. |
| Maguire Exhibits 2 and 3, | " 4, p. 1481-5. |

Referring for instance to Maguire Exhibt 3 (page 1485), Mr. Maguire testified that copper, salmon, silk, matting, lumber and shingles *represent practically all of the large commodities moved eastbound from the coast*, and that in order to make a comparison of the earnings per car in making up his Exhibit 3, he took *all of the cars of copper* that moved from Crofton, on British Columbia Island, between January 1st and September 30, 1907, amounting only to 18; that he took *all of the salmon from all points*, in the month of September, 1907, amounting only to 59 cars; *all of the copper* from Grand Forks, British Columbia, from April 1 to September 30, 1907, amounted to only 54 cars; *all of the silk* from Asia from April 1 to September 30, amounted to but 42 cars; *all of the matting from Asia* from January, 1907, to November 22, 1907, amounted to but 100 cars. As against this meager movement of the principal eastbound commodities there were *in the month of August, 1907*, 546 cars of lumber, and 1280 cars of shingles through to Minnesota Transfer. It is difficult in view of these figures, to understand why the rec-

ord does not show with substantial accuracy the relation between the different commodities that moved eastbound; and why it does not show 'what proportion of the predominating westbound empty car movement is due to lumber production.'

The facts in these exhibits were shown in another form at the hearing before the Master in order to more clearly show the percentage relation between eastbound lumber and all other eastbound commodities on the Northern Pacific and Great Northern lines.

Johnson Exhibit 25 (Vol. 2, p. 603):

*NORTHERN PACIFIC RAILWAY COMPANY.*

STATEMENT SHOWING TONNAGE OF LONG HAUL LUMBER AND SHINGLES AND ALL OTHER COMMODITIES SHIPPED EASTBOUND FROM OREGON AND WASHINGTON WITH RELATION OF EACH TO BOTH.

| | Tons Carried. | Percent. |
|---|---|---|
| Fiscal Year ending June 30, 1904: | | |
| Lumber and Shingles ..... | 711,530 | 85.46% |
| All Other Commodities ... | 121,080 | 14.54% |
| | 832,610 | 100% |
| Fiscal Year ending June 30, 1906: | | |
| Lumber and Shingles .....1,117,721 | | 87.64% |
| All Other Commodities ... | 157,648 | 12.36% |
| | 1,275,369 | 100% |

St. Paul, Minn., April 26th, 1909.

This exhibit is worked out upon the basis of tons and shows that for the year ending June 30, 1906, nearly 88% of the eastbound tons carried was lumber.

Great Northern Exhibit 27 (Vol. 2, p. 613):

*GREAT NORTHERN RAILWAY COMPANY.*

STATEMENT OF LOADS EASTBOUND THROUGH CASCADE TUNNEL FROM MAY, 1907, TO OCTOBER, 1907, INCLUSIVE, DIVIDED BETWEEN LUMBER, SHINGLES, FOREST PRODUCTS, ETC., AND OTHER COMMODITIES AND THE PERCENTAGE THAT LUMBER, ETC., BEARS TO THE TOTAL.

| Month | Lumber, Shingles, etc. | Other Commodities. | Total Loads. |
|---|---|---|---|
| May, 1907 ..... | 2,855 | 834 | 3,689 |
| June, 1907 ..... | 3,612 | 626 | 4,238 |
| July, 1907 ..... | 3,671 | 716 | 4,387 |
| August, 1907 ..... | 3,458 | 777 | 4,235 |
| September, 1907 .... | 2,693 | 727 | 3,420 |
| October, 1907 ..... | 2,774 | 806 | 3,380 |
| Total ..... | 19,063 | 4,486 | 23,549 |

19,063 Lumber, etc..... 80.95%
4,486 Other Commodities..... 19.05%

23,549 Total ..... 100%

Accounting Department,
Train Statistics Office.
4-7-09.

This exhibit is based upon McGuire's Exhibit No. 1, found on page 1477. The latter exhibit shows by actual count for six months in 1907 the number of east-bound loaded cars that moved through the Cascade tunnel. Great Northern Exhibit No. 27 above is a division of these loaded cars between lumber and shingles and all other commodities, and it shows that over 80% of the total eastbound business of that road is lumber. It is, therefore, plain that the *westbound* loaded cars furnish more than enough empty cars on the Coast for the 19.05% of other commodities which are loaded east, and that it is lumber and shingles and nothing else which make the call for empty cars on the Coast and have reversed the direction of the empty car movement.

The necessary result of these findings of the Commission, coupled with the facts in these authentic records of tonnage and car movement, is to establish the truth of the contention that in the matter of the movement of empty cars to the coast, there has been a marked and heavy increase in cost conditions affecting the traffic and to whatever extent other forms of east-bound traffic have increased, it is beyond dispute that the heavy change has been in the growth of lumber loading.

(Note—The Commission turned to the percentages of total empty car movement, east and west bound, covering the entire systems of these companies in all states and involving

all forms of traffic. These the Commission apparently discarded as of no value in this question of the long west-bound haul to the Coast (Opinion Oregon case, Vol. A, No. 451, p. 59). On the Great Northern, for instance, the total empty car haul percentage is made up of the empty car movement during the grain shipping season to the Dakotas, empty coal cars moving back to the head of the Lakes and St. Paul, and particularly, the constant haul of empty cars in the Mesabe iron ore traffic from Lake Superior back to the ore mines.

Mr. Hill testified (Vol. 4, p. 1277):

> "The average on the Great Northern would not bear much relation to the average on some portions. Take the average from east of the main range of the Rocky Mountains to the Coast. At times there are more empty cars; in the last summer there were more empty cars than there were loads.")

III.

In view, therefore, of the conditions existing in 1893 as contrasted with those established to exist in 1906 and 1907 it will be important to further consider the exact relation of the rate as it was made in 1893, to the changed conditions affecting it in the later years.

Mr. Howard Elliott expressed the matter in his testimony as follows (Vol. 4, p. 1372):

> "At that time (1893), and up to seven or eight or even five years ago, the Northern Pacific Railroad was not taxed beyond its reasonable capacity as a freight carrier, so it was

justified, perhaps, in taking on, what might be called extra business at rates far below the average and in using facilities for the benefit of the patrons of the road, that otherwise would not have been used but might have lain idle."

Mr. Hill testified (page 1284):

"I recall an occasion when Mr. Russell Harding was our superintendent. I think it was in 1897. The expense of operation on the lines west of the Rocky Mountains was very high. I was discussing the question with him, and he said, 'Mr. Hill, if I could have one train a day east from the coast to load our empties, I could make a good deal better showing. If I could have two trains or three trains that would load all our empties; it would make a much better showing.' "

The Commission said (Oregon case Vol. A, No. 451 p 50):

"The density of traffic on the defendant lines has increased to such an extent that it is more than can be advantageously handled on single-track roads."

The master found (Vol. A, No. 451, p. 89):

"Since 1897 the lumber industry of this coast and Spokane territory has developed and increased so rapidly that it has constantly outrun the capacity of the roads to handle it, and these roads have been compelled ever since 1897 to spend vast sums in improvements, extensions and far more powerful equipment in order to keep pace with the ever increasing east-bound traffic from those points. Other

> species of east-bound traffic have also increased but the greatest increase is shown to be in the lumber traffic."

So therefor it is established as a fact that instead of being as once, surplus business, this lumber traffic has now gone to such an extent as to outrun capacity to handle it. It is a familiar rule that expense increases with rapidity when capacity is exceeded.

In the case of *In re Louisville & Nashville Railroad Company*, 1 I. C. C. Rep., 69, the Commission in its earlier days recognized the conditions bearing upon surplus traffic of this character, and the justification, and in fact the duty resting upon the carrier to make very low rates to carry it and thereby encourage the movement. The Commmission said:

> "It was shown by the evidence that the rates upon long hauls were such as would admit of the pine lumber of Mississippi being sold in Wisconsin in competition with lumber there cut, and of the iron of Alabama being carried through Pittsburgh to eastern manufactories. If the lines originating in Wisconsin and Pennsylvania give to the products of those states corresponding rates for the traffic in the other direction under similar circumstances, this will prejudice no one; but, on the contrary, may operate to the public advantage, provided always, that the rates actually charged are compensatory. The petitioner in this case claims that in no case does it carry such long

haul traffic at rates which fall below cost. By this, however, is meant only the cost of movement of the particular traffic, leaving out of view the fixed charges of the road, which must, in any event, be provided for, whether the long haul traffic is or is not taken. This distinction between the cost of movement and the fixed charges often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculations, for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The fixed charges of the road may, for purpose of illustration, be assumed to equal one-half of the whole, the cost of movement of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute towards both fixed charges and cost of movement. But now comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little, if anything, more than half what is paid by other traffic. But taking it will not increase perceptibly the fixed charges of the road, because those are made up of items that must be paid whether the traffic is large or small. What is added to the cost by taking it is simply the expense of its own handling and movement; and upon the supposition made, there might perhaps be gain to the road instead of loss in taking it at anything above half the rates which are levied upon other traffic corresponding to it in classification. It might therefore be carried at such rates without wrong to anyone."

Continuing, the opinion proceeds to state under just what conditions the long haul traffic cannot be accepted, and says:

> "But if it were carried at lower rates still, not only would the other traffic be left to pay the fixed charges and the cost of its own movement, but it would also, to some extent, be burdened with the cost of movement of the long haul traffic thus added to the business of the road."

Again on page 79:

> "Every railroad company ought, when it is practicable, to so arrange its tariffs that the burden upon freights shall be proportional on all portions of its line, and with a view to revenue sufficient to meet all the items of current expense, including the cost of keeping up the road, buildings, and equipment, and of returning a fair profit to owners. But it is obvious that, in some cases, when there is water competition at leading points, it may be impossible to make some portion of the traffic pay its equal proportion of the whole cost. If it can then be made to pay anything toward the cost, above what the taking of it would add to the expense, the railroad ought not, in general, to be forced to reject it, since the surplus, under such circumstances, would be profit. As has been tersely said by M. de la Gournerie, formerly inspector general of bridges and railways in France, a railroad 'ought not to neglect any traffic of a kind that will increase its receipts more than its expenses'; and long haul traffic which can only be had on these terms may sometimes be taken without wronging anyone, when, to carry all traffic, or even the major part of it, at the like rates, would be simply

> ruinous. But we desire to apply generally to every kind of competition herein discussed the observation above made, that when competition leads to the transportation of property below actual cost, fairly computed, it ceases to be legitimate. Fair and reasonable competition is a public benefit; excessive and unreasonable competition is a public injury. Competition is to be regulated, not abolished. To other sections of the law of themselves imply ample authority for its regulation, and, in connection with the fourth section, support the interpretation that it is wholly inadmissible to press competition to a point where expenses are increased beyond the increase of income."

In *Schumacher Milling Co. v. C., R. I. & P. Railroad Company*, 4 I. C. C., 373, 378, the Commission said:

> "That a large movement of return empty cars may rightfully under certain circumstances justify a lower rate is undoubtedly true. When articles of traffic do not move on account of a rate which constitutes too great a burden, and the carrier is moving empty cars in the direction in which such articles would naturally move, at a lower rate, the carrier may be justified in carrying at a rate sufficient to bring about their movement, even at a rate barely remunerative. But no extra or additional charge in consequence can justly be put on other articles carried."

The Commission as well as the courts have in numerous other cases expressed the same view of the right of the carrier thus to make use of empty equipment at very low rates; and, in fact, have stated in various ways that it is the duty of a car-

rier to make rates sufficiently low to fill equipment which would otherwise move empty; and there can be no other conclusion from the record in these cases, taking into consideration the character of the competition the Pacific Coast lumber had to meet as a new and untried product, and the low prices then prevailing, that the 40-cent rate then put into effect was considered by both carrier and lumbermen as an abnormally low rate.

The important fact in connection with it, however, now is the reversal since 1893 of the empty car movement. Every analysis of traffic facts, and every legitimate conclusion drawn from changing conditions points in support to the reasons given for the increase of this rate. In 1893 and for years thereafter this traffic was "extra business." It was then taken on and for some years thereafter was moved without noticeably adding to the cost or bearing upon other traffic. Conditions have been reversed; expense has enormously increased and the excuse for the rate in previous years no longer holds good.

In *Tift* v. *Southern Railway Company*, 10 I. C. C., page 586, the Commission held:

> "It is urged in behalf of the carriers that 'for the transportation of lumber they are compelled to haul a large number of flat cars to mills empty, and that it is a common practice for shippers of lumber to load the cars below their capacity.' These are conditions which are properly taken into account by car-

> riers in fixing rates, and which presumably were considered by the defendants in establishing and maintaining the lower rates so long in force prior to the advance. There is no claim that the hauling of empty cars to the mills and the alleged under-loading originated or had increased at the date of the advance, and had not been previously taken into account."

In the present cases the specific claim, and, proof as well, was made that the hauling of empty cars to the mills *originated long after the rate was put in* and had greatly increased by the time of the advance. It was also proved that this empty movement west-bound *was not taken into account* when the rate was established because the empty movement was then east-bound.

## IV

In addition to the foregoing evidence establishing changed conditions, the carriers went further and produced much evidence of the unreasonableness of the old rates, in view of the change in conditions, and of the fairness of the higher scale of November 1st, 1907.

Conceding that there is no exact measure for determining a reasonable rate upon a single article of traffic, there are, nevertheless, persuasive methods of proof upon which the courts have never hesitated in clear cases to act and upon which the Commission customarily acts.

Chicago, Milwaukee & St. Paul Railway Co. vs. Tompkins, 176 U. S 167 : 178.

There are at least three usual and recognized methods of proof of this character and the carrriers produced an ample volume of each.

They offered evidence of witnesses of long and varied railroad experience, such as James J. Hill, and Howard Elliott, who testified at length to the effect stated, and gave their reasons for their opinion.

See evidence of James J. Hill, Vol. 4, pp. 1267 : 1276-8 : 1280 : 1288 : 1294 : 1298.

See evidence of Howard Elliott, Vol. 4, pp. 1372-3-4.

They produced the testimony of lumbermen of wide experience whose testimony met the issue tendered by complainants and fairly showed that the effect of the advanced rates on the industry would not in any way be as claimed.

See testimony of—

D. M. Clough, Vol. 4, p. 300;

J. Poulsen, Vol. 4, p. 1317-18;

C. I. Millard, Vol. 4, p. 1331.

The witness Millard gave a comprehensive analysis of the conditions in effect at and prior to 1893 when the reduced rates were made. He told of the abundance of white pine then being manufactured

and shipped from the northern states of Michigan, Wisconsin and Minnesota and the large volume transported via the Great Lakes and Mississippi river to the treeless states of the middle west. He also developed the conditions under which the yellow pine industry began to ship northward from the southern mills. In speaking of the cheap transportation of lumber and logs via the lakes and rivers from Wisconsin and Michigan, he said (p. 1333):

> "The railroads made very low rates to carry it beyond to supply the treeless states in the west. After the maximum production was reached at Muskegon, Minneapolis was the next center of production, and the fact that logs and lumber could be floated down the Mississippi river at a very low price also increased the desire to manufacture the logs and lumber near the source of supply. The measure of cost from Chippewa Falls or Stillwater to St. Louis on lumber rafted in cribs *did not exceed two cents or two and a half cents a hundred pounds for a thousand mile draft down the river.* The markets of St. Louis were supplied by northern lumber. St. Louis was built of white pine, although we have within a few hundred miles of St. Louis large supplies of southern pine, but until the white pine of the north was nearly exhausted the yellow pine did not become a factor. And the same condition now obtains, inasmuch as by means of the low rates which have been made in the past few years, the western lumber has become a great factor, and is met in the tree-

> less states—Nebraska and Kansas and the Dakotas—by the southern pine in active competition with the northern products."

As a matter of contemporary judgment of railroad traffic men, they showed by the testimony of J. G. Woodworth, Vol. 4, p. 1475, that when the Great Northern Railway Company reduced the rate from the Coast to St. Paul in 1893, to 40 cents per hundred weight, which made the rate to Chicago 50 cents, the Union Pacific lines, reaching from the Coast to Omaha, refused, although for a shorter distance, to meet this reduction. The rates as heretofore shown, prior to 1893, to St. Paul and Omaha were the same. Throughout all of the subsequent years following 1893, lines reaching Omaha from the Northwest have never been willing to go so low and have always maintained a higher rate to Omaha. For a period of time, shortly after 1893 when the Union Pacific lines were in the hands of receivers, a 45 cent rate was in effect from Portland only, to Omaha, but this was later advanced to 50 cents where it continuously remained.

These facts are adverted to by the Commission in the opinion in the Oregon case, Vol. A, No. 451, p. 47.

The carriers also offered evidence showing the character of the rates in question by comparisons with other rates upon the same or other articles of traffic upon the same roads, showing comparative earnings per ton mile and per car. The Wood-

worth and Maguire exhibits, Vol. 4, p. 1433 et seq., and the testimony of these witnesses bears upon these comparisons.

R. B. Miller, General Freight Agent of the Oregon Railroad & Navigation Company, offered similar evidence (Vol 4, p. 1500: 1512.)

Howard Elliott, as heretofore stated, offered a comprehensive analysis and comparison of conditions on these northern lines, with those on the Illinois Central, for the purpose of demonstrating that the rates prescribed in the advanced tariffs of November 1st, 1907, were relatively lower in consideration of the amount of service performed, than rates on yellow pine lumber approved by the Commission in its decision in the Yellow Pine cases, 10 I. C. C. 505: 548. This analysis appears in Elliott's testimony, Vol. 4, p. 1374 et seq.

The carriers also offered evidence, by approximate computations, of cost of transportation. James J. Hill testified, Vol. 4, p. 1280, upon this subject.

R. I. Farrington, Vice-President of the Great Northern Railway Company, Vol. 4, p. 1602, testified to careful computations made to determine the *comparative* increase in cost of transportation, using the calendar years 1895, 1900 and eleven months ending November 30th, 1907, for that purpose. Taking the year 1895 as 100 per cent, he ascertained the approximate cost per freight train mile for the year 1900 to have been 143.82 per cent of 1895 and for the eleven months ended November

30th, 1907, the percentage was 207.7 per cent of 1895. Per freight car mile upon the same basis, the cost in 1900 was 126.19 per cent of 1895, and in 1907 it was 162.77 per cent of 1895. He carefully explained the methods adopted and showed the factors used to have been based upon requirements fixed by the Commission in 1893 for the apportionment of operating expenses between freight and passenger traffic. Having thus obtained the operating expenses on the freight traffic for each of the years used, he divided those expenses by the freight train mileage and the freight car mileage to secure his results. The percentages of increase in cost thus shown, while not establishing actual cost, did establish the relative or comparative increase in cost over the period taken.

In the light of this volume of testimony and the utter absence of effort on the part of the complainants to meet it, it is not surprising that in the dissenting opinions of Chairman Knapp and Commissioner Harlan we find corroboration of the proof of the character of these rates.

In that opinion it was said: (Vol. A, No. 451, p. 63):

> "It is clear to me that the rates in question do not belong to the class of rates originally established on a reasonable basis in the estimation of the carrier, and which therefore ought not to be advanced without convincing reason. In other words, we are not dealing in these cases with the questions of the general

advance in the rates which has been the subject of recent discussions, nor with the ordinary rate situation which has been voluntarily maintained for a period of years, *but with an exceptional instance of rates fixed at a very low figure*, lower than might have been lawfully charged, because peculiar conditions induced the carrier to make rates for the time being on a particular commodity which were below the standard of reasonableness. All the circumstances indicate to my mind that these rates when established were regarded by the carriers, and by the shippers as well, as uncommonly, if not abnormally low, and that both parties apparently anticipated that at a later date they would be advanced."

And again:

"I am therefore of the opinion that these conceded and significant changes in conditions warranted the defendants in increasing rates *which were understood to be on a very low scale* when lumber was worth little more than two-thirds its present value and when railway service was much more cheaply performed."

And again: (p. 64):

"But it appears to me entirely clear that no considerable part, if any, of this surplus resulted from the transportation of lumber to the territory affected by the advance in rates. This statement seems *to be fully confirmed by the fact that the ton mile rates on this lumber were very much less than the average ton mile rates upon all traffic of the defendant lines, including this lumber traffic.* I cannot concede that the unreasonableness of these advanced rates on lumber may be inferred from the show-

ing that aggregate earnings from all traffic could be reduced without apparent injustice to these carriers, when the earnings on lumber under the old rates were extremely moderate and even under the advanced rates are comparatively small."

And finally:

"Taking into account all the transportation conditions, including the haul over two mountain ranges and through a long stretch of territory which furnishes little traffic, I am of the opinion *that even the advanced rates are among the lowest on which any considerable volume of lumber is anywhere moved.* They are the lowest rates, all things considered, which the defendants charge on that commodity, and relatively low in comparison with their rates on other traffic. *The old rates may fairly be regarded as unreasonably low*, even if they did not discriminate against other traffic, and I think the defendants were justified in applying a higher scale of charges."

We have now fairly indicated the state of the record before the Commission on the question of the reasonableness of the rates in question for the service rendered, and assert that, measured by ordinary standards that obtain in courts of justice and that should obtain in hearings before the Commission, the carriers gave "a good reason" for a change and advance in these rates. The proof that it was "a good reason" lies in the fact as asserted that the Commission, in every substantial aspect of the matter, found that the facts upon which the reason rested, were true.

We do not further dwell upon the presumption, if such it be, which is said to arise from the long continuance of a particular scale of rates. The decision of this court in Interstate Commerce Commission against Chicago Great Western Railway Company, 209 U. S. 108, above referred to, defines the rule and it is clear that upon the showing of a good reason, the effect of the continuance of the previous rates becomes of small importance and the issue then stands for determination upon the proof offered for and against the rates in question.

The Commission erred as a matter of law in the weight given to this so-called presumption in the face of convincing proof, and this error is the more apparent when it is observed from the opinions, that the facts supporting the reasons given by the carriers were as stated, substantially found to be true by the Commission.

Finally, we also pass by the other ground taken by the Commission in its opinions, namely, that because of apparent ample revenue from total business and all sources, the advance in these rates was excessive. It will be immediately noticed that while there was a showing before it of gross revenues, operating expenses, net income and financial statistics of a general character, offered by the complainants, there was no evidence offered nor issue tendered by the carriers pertaining to this subject. There was no evidence before the Commission of the present value of the properties

of these companies, and, therefore, no basis for their determination whether revenues were fair and reasonable as a whole. Their observations in this regard were mere matters of passing opinion, without adequate evidence upon which to base them.

The essential criticism, however, upon their action in this regard appears from the fact that, in determining the reasonableness of a rate upon a single commodity, revenue yielded on all traffic can have only a very remote, if any, practical bearing. This is not a question of law in this aspect of the matter, but one of fact; it is rather a question of the probative effect as a matter of fact of such evidence. The peculiar province of the Commission is within the limitations in the Act to regulate Commerce, upon its power, to determine all questions of fact relating to the reasonableness of rates and it is not denied that its determination of controverted questions of fact is not open for review by the courts. The question here is of the probative effect as a matter of fact, of the total earnings from all business, in determining the reasonableness of a rate on a single commodity like lumber. In the cases at bar, as seen from the majority opinion and as commented upon by the dissenting opinion, one of the controlling reasons for the conclusions adopted, was the apparent belief that the reasonableness of these lumber rates

were to be determined in part, at least, from evidence tending to show adequate returns from all business.

It is difficult to reconcile this conclusion with the holding of the Commission in Central Yellow Pine Association vs. Illinois Central R. R. Co., 10 I. C. C. 539, which involved the reasonableness of rates on yellow pine from southern states, in which the Commission said:

> "While the Supreme Court has undertaken to point out 'certain elements' to be considered in determining the reasonableness of an entire system of rates, it has not named any as shedding light upon the reasonableness of a rate on a single commodity like lumber. It is evident that such elements are widely variant in the two cases. Where an entire system of rates is involved, the principal, if not the only question, is, whether the revenue yielded by the rates on all traffic is a fair return on the value of that which is 'employed for the public convenience'—a question, the determination of which, as we have shown, *can have only a very remote, if any practical bearing on the reasonableness of a rate on a single article of traffic.* On the other hand, where the rate on a single article is in issue, the question (which could not arise in the former case), whether the rate is unjustly discriminatory or unduly preferential, may be presented, *and the reasonableness of the rate depends upon the value, volume, and other characteristics affecting the transportation of the particular commodity to which it is applied.*"

And in the same case the Commission recognized the futility of taking the entire financial situation and operations of a carrier into consideration in passing upon a single rate, thus:

> "The rate on one article of traffic may be reasonably high and the carrier fail to earn a fair return on the value of the entire property employed for the public convenience because of unreasonably low rates on other traffic, and vice versa, the rate on one article of traffic may be unremunerative or unreasonably low and the return to the carrier from its entire business may be fair or reasonably high, the deficiency under the rate on the one article of traffic being made up by the rates on the balance of the traffic."

Passing therefore, to the real ground adopted by the Commission for its conclusions, we assert that they were based upon a view that it had the power under the Act to Regulate Commerce, to so adjust these rates as to protect the lumber interests on the Coast and in other districts involved, in the competitive markets in the middle west from the consequence which it was led to believe would flow from the advance in the rates in question, even if the advanced rates amounted to no more than reasonable charges for the service rendered.

The complainants before the Commission were clearly of the opinion that this was the duty of the Commission. The substance of their complaints

hereinbefore quoted shows that this is true. They asserted therein that the industry had been built up upon the faith of a continuance of the old rates and that ruin would follow any advance thereof. They directed their proof in support of these allegations and invited the issue thereon. Their plea was substantially a single one, namely, that it was the duty of the carriers, and of the Commission in exercising its power of regulation, to maintain in effect such rates as would always permit the shipment of their surplus output eastward over three mountain ranges to the treeless and competitive states of the middle west.

As heretofore noted, these cases were but a part of the general issue then pending before the Commission, calling for the establishment of rates upon lumber from the Coast district to all southern and eastern destinations. The decision of this court on February 20th, 1911, in Southern Pacific Company et al against Interstate Commerce Commission, No. 527, October Term, 1910, was the final decision of the issues upon one of the several complaints then before the Commission. The fir lumber in the Willamette Valley, which was the subject of consideration in that case, in its southbound shipment to San Francisco, is the same fir lumber that is the subject of consideration in determining the rates in these cases, for eastbound shipment. As stated in the opinion in the Oregon case, (Vol. A, No. 451, p. 61,) the coast basis of

rates for eastern shipment applies southward from Portland throughout the whole length of the Willamette Valley and beyond, to Medford, Oregon, nearly to the California state line, and the testimony of A. C. Dixon, (Vol. 3 Transcript p. 1052) one of the shippers of that district, supported the finding of the Commission, that lumber moves under these rates eastbound, from as far south as Cottage Grove, 150 miles below Portland. The problem, therefore, before the Commission was essentially the same in each of the cases, and we assert that the conclusions of this court in the so-called Willamette Valley case, upon the record in that case, apply with equal force to the record in these cases. We assert that the record here establishes with equal clearness, that the exertion of the power in these cases by the Commission gives rise to the unavoidable inference that the Commission established these rates in precisely the same manner in which it established the rate to San Francisco.

In the Willamette case, this court stated that the complaint before the Commission in that case gave rise "to the inference that in substance the subject complained of was not intrinsic unreasonableness of the new rate which the railroad companies substituted for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that

is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just."

The Court examined the state of the record in that case and noted the position of the complainants. It noted that "no proof whatever bearing upon an issue as to the reasonableness of the $5.00 rate (there in issue) for the service to be rendered, was introduced by the complainants." It examined the opinion of the Commission in the light of the complaint and the record, and while it observed that the opinion of the Commission may contain some sentences "which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned," the court concluded from a consideration of the opinion as a whole, in the light of the condition of the record, that the conclusion of the Commission was based upon a belief in its power and right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change in the rate without regard to whether the change was only to a just and reasonable charge.

We earnestly contend that a like consideration of the complaints and the record before the Commission in these cases, and the opinions of the Commission thereon, must necessarily lead to the same result. By its answer in these cases the Commis-

sion has asserted that the record in the Willamette Valley case was before it by stipulation, in determining the issues in these cases. In the orders in these cases, the order in the Willamette Valley case is referred to as marking the division of the territory, to which the rates fixed in each of the cases, are intended to apply. The orders were entered at the same time or substantially so; the cases were under consideration contemporaneously and it inevitably follows that the belief entertained by the Commission as to its power in the Willamette case was equally entertained in its disposition of the cases at bar. We assert that the record in these cases evidences no less clearly than in that case, that the same character of power was exercised here as there. Upon each of the grounds stated, we respectfully insist that the Court below was right in the conclusion reached and ask that the decrees be affirmed.

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